Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

EXXON MOBIL CORPORATION
and TOSCO CORPORATION,

Petitioners,

v.

GALE A. NORTON, Secretary, United States Department of the Interior; THE UNITED STATES DEPARTMENT OF THE INTERIOR; KATHLEEN CLARKE, Director of Land Management, United States Department of the Interior; and DOUGLAS M. KOZA, Associate Director of the Colorado State Office of the Bureau of Land Management,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision below conflicts with this Court's rulings in *Wilbur v. Krushnic,* 280 U.S. 306 (1930), *Hickel v. Oil Shale Corp.,* 400 U.S. 48 (1970), and *United States v. Locke,* 471 U.S. 84 (1985).

2. Whether the retroactive application of a drastic change of policy by an administrative agency, which imposes as a condition for the past maintenance of a vested property interest new requirements that could not reasonably have been anticipated in light of clear prior decisions of this Court and unambiguous prior administrative policies, violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

LIST OF PARTIES

Petitioners: Exxon Mobil Corporation. Pursuant to Supreme Court Rule 29.6, Exxon Mobil Corporation declares that it is a publicly held corporation, not a subsidiary of any parent corporation, and that no publicly held company holds 10% or more of its stock.

TOSCO Corporation. Pursuant to Supreme Court Rule 29.6, TOSCO Corporation represents that it was merged into ConocoPhillips Company, a wholly owned subsidiary of ConocoPhillips Holding Company, which is a wholly owned subsidiary of ConocoPhillips, which is a publicly held company, not a subsidiary of any other corporation, and no publicly held company owns 10% or more of its stock.

Respondents: Gale A. Norton, Secretary, U.S. Department of the Interior; Kathleen B. Clarke, Director, Bureau of Land Management, U.S. Department of the Interior; and Douglas M. Koza, Associate Director of the Colorado State Office of the Bureau of Land Management.

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PETITION FOR WRIT OF CERTIORARI

Exxon Mobil Corporation ("Exxon") and TOSCO Corporation ("TOSCO") hereby petition this Court for issuance of a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit from which review is sought is reported at 346 F.3d 1244 (2003) and is reproduced at App. 1. The opinion of the U.S. District Court for the District of Colorado is reported at 206 F. Supp. 2d 1085 (2002) and is reproduced at App. 24. The decision of the Interior Board of Land Appeals ("IBLA") from which judicial review was sought is reported at IBLA 98-164, 153 IBLA 205 (2000) and is reproduced at App. 49.

JURISDICTION

The judgment of the Tenth Circuit was entered on October 15, 2003. App. 1. Pursuant to Supreme Court Rule 13.3, this Petition is timely filed within 90 days of the Tenth Circuit's judgment. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the judgment of the Tenth Circuit.

STATUTES INVOLVED

This Petition involves the statutory right to preserve an unpatented mining claim by resuming work after a lapse in work and before assertion of a challenge to the validity of the claim based on the prior lapse. That right is found in the General Mining Law of 1872 ("Mining Law"), 30 U.S.C. § 22 *et seq.*, which provides:

> On each claim located after the 10th day of May 1872 . . . and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. . . . [U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, *provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.*

30 U.S.C. § 28 (emphasis added); App. 66-67.

This Petition also involves the Savings Clause in the Mineral Leasing Act ("Leasing Act"), 30 U.S.C. § 181 *et seq.*, which provides:

> The deposits of . . . oil shale . . . in lands valuable for such minerals, shall be subject to disposition only in the form and manner provided in [the Leasing Act] . . . except as to valid claims existent [on February 20, 1920] and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

30 U.S.C. § 193; App. 68.

STATEMENT OF THE CASE

In 1966 Exxon purchased 20 oil shale mining claims encompassing approximately 3,200 acres, and in 1974-79 TOSCO purchased 12 such claims encompassing approximately 1,912 acres (in the aggregate or separately, "Claims"), all in Garfield County, Colorado. App. 3-5, 25, 51-52. Exxon's predecessors-in-interest located the Claims on December 1, 1919, perfecting them with discoveries of natural exposures of oil shale within the surface boundaries

of each claim; TOSCO's predecessors-in-interest did likewise on December 6, 1917. App. 51-52. The Claims were located within the Green River Formation, the "greatest known potential oil resource" in the world, containing the equivalent of 1,800 billion barrels of oil, most of which are in Colorado's Piceance Creek Basin, which includes the Claims. *See TOSCO Corp. v. Hodel*, 611 F. Supp. 1130, 1154-55 (D. Colo. 1985) ("*TOSCO II*") (discussing the geology of the Green River Formation), *vacated pursuant to settlement agreement,* 826 F.2d 948 (10th Cir. 1987).

The Claims were located under the General Mining Law of 1872, 30 U.S.C. §§ 21-54. At the time the Claims were located, a rival private locator could take advantage of a lapse in assessment work and locate a new claim for the same lands during a lapse. The United States, however, had no concern respecting performance of assessment work, and Interior's regulations made that quite clear. *E.g., Regulations, Nature and Extent of Mining Claims*, 44 L.D. 285, 287, 300 (1915) ("Failure to make the [assessment work expenditure] will subject a claim to relocation, unless the original locator . . . or legal representatives have resumed work after such failure and before relocation."; annual work is "solely a matter between rival or adverse claimants . . . and goes only to the right of possession, the determination of which is left exclusively to the courts.").

In 1920, Congress passed the Mineral Leasing Act, which had the effect of repealing the General Mining Law of 1872 with respect to new claims not in existence as of February 25, 1920. However, the Mineral Leasing Act included a Savings Clause that preserved "valid claims existent at the date of passage of the act and thereafter

maintained in compliance with the law under which initiated." 30 U.S.C. § 193.

Interior promptly published *Instructions*, 47 L.D. 548 (May 10, 1920), on the patentability of oil shale claims. The *Instructions* made no change to Interior's existing general regulations on mining claims respecting performance of assessment work being a matter that could arise only in private suits between adverse private claimants to the same land.

In later assessing the validity of specific oil shale claims, however, Interior asserted that defaults in performance of assessment work forfeited an oil shale claim, with the lands automatically reverting to the public domain. In the 1930 test case of *Wilbur v. Krushnic*, 280 U.S. 306, the Court unanimously rejected Interior's contentions, explaining that prior to the Leasing Act "So far as the government was concerned, failure to do assessment work for any year was without effect," that the Mineral Leasing Act had not amended the mining laws as to pre-existent claims, and that such claims could be maintained within the meaning of the Savings Clause by resumption of work, which "does not *restore* a *lost* estate – . . . it *preserves* an *existing* estate. . . . " 280 U.S. 306, 317-18 (italics in original) ("*Krushnic*").[1]

Noting that *Krushnic* had reserved decision on what would have been the effect of a government challenge

[1] Interior had declared the claims of Exxon's predecessor-in-interest invalid, in whole or in part, prior to *Krushnic*, solely for work default for the year ending July 1, 1929, and in post-*Krushnic* proceedings alleging assertion of challenges in March-May 1930 prior to resumption of work.

during a lapse in work, Interior promptly challenged virtually all oil shale claims. Very few claimants were still doing work, and in the early 1930s Interior declared thousands of claims invalid solely for nonperformance of annual work. *See TOSCO II*, 611 F. Supp. at 1149 (discussing the general history of oil shale litigation from the 1920s to the 1980s). This effort met with an even more resounding defeat in this Court, which ruled in another test case in 1935 that Interior had no interest in performance of assessment work and that its challenges and decisions went "beyond the authority conferred by law." *Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. 639, 647 ("*Virginia-Colorado*").

Shortly after *Virginia-Colorado*, Interior ruled in *The Shale Oil Company*, 55 I.D. 287, 290 (June 24, 1935), that its prior assessment work challenges including its decisions therein were "without authority of law and void", and overruled all of its prior decisions invalidating claims for assessment work defaults. For many years thereafter, Interior consistently responded to inquiries from oil shale claim owners and others that any declaration of invalidity based on nonperformance of assessment work was "null and void" and did not affect the right of the owner of the claim to maintain his possession thereof under the mining law. *TOSCO II*, 611 F. Supp. at 1160-62. Interior's consistent recognition that it had no concern with assessment work – until 1972 – and that a lapse in work could be cured by resumption prior to assertion of an adverse challenge – until 1993 – was reflected in its issuance of patents over several decades for oil shale claims for which there was no evidence of performance of work for many years. Altogether, patents issued for 2,862 oil shale claims between 1920 and 1991. App. 46. Within this total, Interior patented 507 claims by July 6, 1960, that had been

declared invalid solely for lapses in assessment work prior to the *Virginia-Colorado* and *The Shale Oil Company* decisions of June 1935. *TOSCO II*, 611 F. Supp. at 1169.

Despite the clear guidance from this Court in *Krushnic* and *Virginia-Colorado* and the clear regulations stating that lapses in assessment work would not subject a claimant to a successful contest by Interior, Exxon and its predecessors-in-interest performed assessment work during this period. In the 1950s, Exxon's predecessors-in-interest drilled cores to sample the oil shale deposits in the area of the Claims, and reported the results to the Bureau of Mines, which published them in its official Bulletins. Beginning shortly following its acquisition of the Claims (in the 1960s and 1970s), Exxon performed work for their benefit each year until issuance of Final Certificates. App. 6, 42. It is undisputed that assessment work had been performed during the years 1957, 1958, 1964, and 1966 and during a one year period between 1967 and 1972 for Exxon's Claims, and in 1919-1928, 1958, 1959 and 1975-87 for TOSCO's Claims. App. 5-6, 54-55.

In 1970, the Court decided *Hickel v. Oil Shale Corp.*, 460 U.S. 48, 91. The Court addressed once again the question whether the United States had any interest in the performance of assessment work by a mining claimant. Disagreeing with its statements in its prior decisions in *Krushnic* and *Virginia-Colorado*, that the failure to do assessment work gives the Government no ground for forfeiture but inures only to the benefit of relocators, *id.* at 52, 91 S. Ct. at 199, the Court held that a mining claim could be forfeited to the public domain under the doctrine of abandonment. *Id.* at 56. The Court concluded that

> We now hold that token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28, is not adequate to 'maintain' the claims within the meaning of § 37 of the Leasing Act.

Id. at 57.

The *Hickel* Court did not hold that the "substantial compliance" rule should be applied to the case before it in a dispositive way; rather, the Court expressly reserved for a determination by the lower courts "all issues relevant to the current validity of these contest proceedings," including the issue whether Interior should be allowed to change its regulations retroactively, and other issues relevant to the validity of the Claims. 400 U.S. at 58. Furthermore, the Court did not question the alternative holding in *Krushnic* that any challenge must be made during a work default.

In the wake of *Hickel*, Interior revised its regulations in 1972 to state ***for the first time***[2] that "failure of a mining claimant to comply substantially with the [assessment work requirement] . . . will render the claim subject to cancellation" 43 C.F.R. § 3851.3(a) (1973), as added by 37 Fed. Reg. 17836, September 1, 1972. Interior did not say, however, that lapses in assessment work would themselves cause a claim to be forfeited. Indeed, it continued to state, in subsection 3851.3(b), that failure to do the

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[2] See proposed rule, "Assessment Work General," 36 Fed. Reg. 13153 (July 15, 1971) ("The Department's regulations . . . state that failure to perform the required work relates solely to the right of possession between rival or adverse claimants to the same mineral land. . . . Hickel . . . makes it clear that this regulation is not consistent with the law.").

work would subject a claim to relocation unless "after such failure and before relocation", the work is resumed.[3] As Interior explained in 1991, the 1972 change had enabled it to contest claims for nonperformance of work "subject to the resumption principle," noting that "The resumption principle is an essential part" of the "Mining Law of 1872". 56 Fed. Reg. 939-940.

Immediately after *Hickel* and the 1972 regulation, Exxon began to file affidavits of annual assessment work. App. 6. In January 1984, Exxon filed a patent application for the Claims. App. 4. Exxon continued to file annual affidavits of assessment work until June 15, 1989, when Interior determined that Exxon had complied with the documentation requirements of the Mineral Leasing Act and issued First-Half Final Certificates, terminating any obligation to perform annual assessment work on the Claims. App. 4-5.[4] TOSCO began acquisition of its Claims in the mid-1970s and performed assessment work on them and filed affidavits of work from 1975 through 1987. TOSCO applied for patent in June 1985 and obtained First-Half Final Certificate on July 27, 1988, ending its obligation to perform work as of 1987. App. 4-5. In addition to the assessment work that was undisputedly performed, "Exxon and TOSCO, respectively, have spent over a billion dollars and tens of millions of dollars in acquisition,

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[3] What had been § 3851.4 was so modified, and became § 3851.3(a). What had been § 3851.3 became § 3851.3(b).

[4] In 1992 Congress displaced the annual work requirement with payments to the Treasury. *See* Interior Department and Related Agencies Appropriation Act of 1993, P.L. 102-381, 106 Stat. 1374, 30 U.S.C. § 28f(a); The Energy Policy Act of 1992, P.L. 102-486, 106 Stat. 2776, 30 U.S.C. § 242.

research, development, maintenance, and other expenses relating to oil shale development." App. 25.

As recently as 1988, Interior issued a memorandum reiterating its policy that the resumption doctrine still applied as an absolute defense to challenges to oil shale mining claims by the Government based on alleged lapses in assessment work. App. 69, 73. This long-standing policy changed suddenly in 1993, when Interior again revised its regulations, to state – ***for the first time*** – that failure to perform work would cause a claim to "revert to the public domain."[5]

In 1995, 25 years after the decision in *Hickel*, 10 years or more after the patent applications, and 6 years or more after satisfaction of all requirements necessary for the issuance of patents, Interior brought the present contests against the Claims. Interior asserted that, as stated in its 1993 regulation, the Claims had reverted back to the public domain at some indefinite past time due to unspecified past lapses in the performance of annual assessment work.

Following a trial, the ALJ acknowledged that Exxon and its predecessors-in-interest had performed work on the Claims at various past times including road maintenance work performed annually from assessment year ending in 1973 until the assessment year ending in 1988. App. 55-56. He disallowed the latter work as likely done to facilitate access by ranchers rather than for mining purposes. He also accepted testimony that aerial photographs and on-the-ground inspections in the 1980s and

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[5] 58 Fed. Reg. 38202, July 15 (1993); 43 C.F.R. §§ 3851.3(a), (b) (1999).

1990s proved that work had not otherwise been done from 1920 on. He accepted the work TOSCO and predecessors-in-interest performed but found non-performance in numerous individual years. He found the Claims of both Petitioners invalid for assessment work defaults, without regard to the intent of the owners of the Claims. He found that resumption of work prior to the 1995 challenge was immaterial on the theory that *Hickel* had abrogated the statutory right to preserve a claim by resuming work. IBLA affirmed on December 31, 2000, holding that the claims were void solely as a result of the lapses in assessment work found by the ALJ to have occurred and that the resumption doctrine was no longer applicable to oil shale claims. App. 63-65. The courts below affirmed on the same grounds. App. 13-16, 38-42.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's decision conflicts with *Krushnic*'s holding that resumption of work prior to a challenge preserves a claim, and ignores the instructions in *Hickel* and *Locke* that a subjective test of intent to abandon should determine whether past non-performance of work terminated a claim.

Even if the standards applied in the decisions below can somehow be reconciled with the Court's precedents, their retroactive application in this case raises compelling constitutional questions regarding the power of the federal government to effectuate forfeitures of vested property interests without giving fair warning to those who relied on clear prior administrative policies and judicial interpretations. The Court's prior retroactivity decisions have repeatedly acknowledged certain fundamental fairness limitations to retroactivity so deeply rooted in our

constitutional framework that they seemingly cannot be questioned, but the opportunity to apply these principles to the facts of a case has proved elusive. This case provides the Court with an opportunity to give needed additional guidance to the lower courts on the due process right to fair warning.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS IN *KRUSHNIC*, *HICKEL*, AND *LOCKE*.

In its opinion below, the Tenth Circuit rejected this Court's statutory analysis in *Krushnic*, which has never been overruled, that

> after failure to do assessment work, the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened . . . Such resumption . . . *preserves* an *existing* estate.

280 U.S. at 317-18 (italics in original).

Even when *Krushnic* was decided, it was well-established that an existing estate could be lost by abandonment, and that non-performance of work may constitute some evidence tending to show abandonment. However, abandonment depended on the *intent* of the claim owner. *See Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. 639, 645 (1935) (collecting prior cases addressing abandonment of a mining claim). Under an abandonment analysis, a lapse in assessment work, by itself, did not terminate a claim; rather, it could merely be evidence of a subjective intention to relinquish the claimant's property interest in the claim. In a case not involving alleged abandonment, the *Krushnic* Court held that

nonperformance of assessment work could only result in the loss of the claim if a challenge were made ***during*** a lapse in work. Thus, *Krushnic* allowed for the possibility that a claim could be lost even without abandonment, but only if a challenge was made prior to resumption of work.[6]

The Court's decision in *Hickel* did nothing to alter these principles. In *Hickel,* this Court held that because lapses in work could be evidence of abandonment, Interior had jurisdiction to consider whether assessment work had been performed. 400 U.S. at 56-57. As the Court later characterized its holding:

> Thus, it was open to the Court to conclude in *Hickel* that Congress had intended to make the assessment work merely an indicium of a claimant's specific intent to retain a claim. Full compliance with the assessment work requirements would establish conclusively an intent to keep the claim, but less than full compliance would not by force of law operate to deprive a claimant of his claim. Instead, less than full compliance would subject the mine owner to a case-by-case determination of whether he nonetheless intended to keep his claim.

Locke, 471 U.S. 84, 101-02.

Hickel therefore did not disturb the *Krushnic* requirement that if all that Interior alleged was a lapse in work (as opposed to an actual abandonment), the challenge must be made prior to resumption of work. Indeed,

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[6] However, from 1935 until 1970, when *Hickel* was decided, that possibility appeared to be resolved firmly against Interior. *Virginia-Colorado*, 295 U.S. at 645 ("So far as the government was concerned, failure to do assessment work for any year was without effect.").

that requirement was not at issue: footnote 21 at page 48 of the Brief for Petitioner said, "We view [*Krushnic*] as holding only . . . that at least some affirmative governmental action to withdraw the lands during a period of assessment work lapse was called for. Whether or not such a holding is also questionable, it imposes no substantial burden on the development or administration of the public lands." Interior reaffirmed this interpretation as recently as December 16, 1988, when it issued a Memorandum recognizing that *Krushnic* "holds that the resumption principle of the mining law . . . bars challenge of mining claims by the Government as well as by rival claimants after assessment work is resumed." App. 73.[7]

The Tenth Circuit found the Claims invalid even though the sole basis for invalidity was alleged past lapses in assessment work and even though the contest complaints were not filed until 1995, a time when there was no continuing default in assessment work. The court did so without regard to any intent of the claimants to hold the Claims and despite the lack of any assertion that an actual abandonment of the Claims had occurred. As aptly characterized by the district court in the *Cliffs Synfuel* litigation, this analysis required "a remarkable extrapolation from *Hickel*, one that dilutes the Supreme Court's guidance ***and pushes the margin of reasonable interpretation***." *Cliffs Synfuel Corp. v. Babbitt*, 147 F. Supp. 2d 1118, 1123 (D. Colo. 2001) (emphasis added), *rev'd* 291 F.3d 1250 (10th Cir. 2002). The Petition for Writ of Certiorari should

[7] As late as 1990, Interior officials told the Congress that *Krushnic* meant that "the government may not take advantage of a past lapse in assessment work when such work is resumed prior to initiation of a contest." S. Rep. No. 260, 101st Cong., 2nd Sess. (1990).

be granted to correct the miscarriage of justice that has occurred because of the Tenth Circuit's failure to apply the appropriate analytical framework set forth by this Court in *Krushnic*, *Hickel*, and *Locke*.

In the alternative, as discussed in the following section, even if the analysis employed by the Tenth Circuit could somehow be reconciled with the Court's earlier pronouncements when viewed with the benefit of hindsight, the retroactive application of that analysis and Interior's drastic shift in policy violates due process.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS REGARDING RETROACTIVE APPLICATION OF NEW RULES TO FRUSTRATE RELIANCE-BASED EXPECTATIONS.

A. THIS COURT'S PRECEDENTS MAKE CLEAR THAT THE DUE PROCESS CLAUSE GIVES RISE TO A RIGHT TO FAIR WARNING.

This Court's prior decisions make clear that there is a constitutional right to fair warning implicit in the Due Process Clause of the Fifth Amendment to the United States Constitution. *E.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). As the Court pointed out in *Landgraf*:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed

> when the conduct took place has timeless and universal appeal.". . . . In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

Landgraf, 511 U.S. at 265-66 (Stevens, J.) (internal footnotes omitted) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

A majority of this Court has also made clear that under the right facts, the Due Process Clause imposes a limitation on changes in the law that, if applied retroactively, would have the effect of defeating property rights. *See Eastern Enter. v. Apfel*, 524 U.S. 498, 548-49 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity."); *see also id.* at 558 (Breyer, J. dissenting) ("To find that the Due Process Clause . . . protects against an unfair allocation of public burdens through this kind of specially arbitrary retroactive means – is to read the Clause in light of its basic purpose: the *fair application of law*, which purpose hearkens back to the Magna Carta.") (emphasis in original).

There can be little argument that these principles of fair warning and fair application of law are fundamental to due process. However, the opportunity to illustrate the practical application of these principles has proved elusive. One line of cases addresses the retroactive application of a

decision of this Court to the facts of the case before it. In this context, the Court has struggled with the tensions between the due process concerns raised by the retroactive application of a judicial interpretation of a statute that radically alters prior understanding of the state of the law and the need for uniformity in decision making. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971) (permitting the prospective application only of a judicial decision upon consideration of three factors), *abrogated in part by Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) (holding that a judicial decision in a civil case must be applied retroactively in later cases if the Court in the case in which the new rule was announced applied the rule to the facts before it); *see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982) (refusing to give retroactive effect to a decision declaring the Bankruptcy Reform Act unconstitutional where to do so "surely would visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts").[8]

The cases in which this Court has been asked to address the constitutionality of a retroactive application of a new judicially imposed rule or interpretation have ultimately not involved facts in which the new rule was clearly unforeseeable in light of clear existing law. For example, in the criminal case of *Rogers v. Tennessee*, 532 U.S. 451 (2001), the Court rejected a challenge based on the due process right to fair warning to the retroactive

[8] As discussed below, this is not a case in which the rule sought to be imposed retroactively was applied by the Court in the decision in which the new rule was announced.

application of a Tennessee Supreme Court decision abrogating the "year-and-a-day rule," applicable to the crime of murder. However, the outcome in *Rogers* was driven in large part by the conclusion that the change in the law was "not unexpected or indefensible." *Id.* at 462-63. Similarly, in the civil case of *United States v. Estate of Donnelly*, 397 U.S. 286, 294-95 (1970), the Court reached a similar conclusion because it found that there was no clear prior legal pronouncement on the issue that would have created "justified reliance." Consequently, these cases have not permitted a true inquiry into whether and to what extent due process prohibits retroactive application of a decision that, in light of clear prior precedent, undisputedly was not foreseeable.

Although not decided expressly under the Due Process Clause, this Court's decision in *Chicot County Drainage Dist. v. Baxter State Bank* reflects this Court's recognition of fundamental limitations on retroactive application of interpretive decisions in a manner that disturbs the vested rights of a party. In *Chicot County*, the Court ruled that a judgment could not be opened to collateral attack notwithstanding that a statute on which the judgment had been based was later declared unconstitutional. 308 U.S. 371, 372-74 (1940). The Court reasoned:

> The actual existence of a prior statute, prior to [a later ruling declaring the statute unconstitutional] is an operative fact and may have consequences which cannot justly be ignored. ***The past cannot always be erased by a new judicial declaration. . . . Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in light of the nature both of the***

> ***statute and of its previous application, demand examination.***

Id. at 374 (emphasis added). In *Estate of Donnelly*, although the Court distinguished *Chicot County* based on its conclusion that no clear prior legal pronouncement in the issue that would have created "justified reliance," the Court stated in dicta that "***[i]n rare cases, decisions construing federal statutes might be denied full retroactive effect, as for instance where this Court overrules its own construction of a statute.***" *Id.* at 295 (emphasis added).

The principles articulated in *Chicot County* and *Estate of Donnelly* have properly been interpreted by the Eighth Circuit to extend to prohibit retroactive application of new statutory interpretation of this Court where retroactive application would cause substantial hardship and injustice to litigants who relied on the earlier interpretation of the statute. *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164, 1173 (8th Cir. 1990). The Fifth Circuit previously applied similar principles to clarify the extent to which an interpretive agency rule may be applied retroactively, holding that a prior decision need not be technically overruled before a limitation of prospectivity may be imposed on a new decision. Instead, "[a]brupt departure from well established practice" of an agency is sufficient. *McDonald v. Watt*, 653 F.2d 1035 (5th Cir. 1981) (citing *Safarik v. Udall*, 304 F.2d 944, 949 (D.C. Cir. 1962)). Even the Tenth Circuit has previously recognized that a judicial decision should not be applied retroactively where "rights [have been] acquired upon the faith of a [prior] decision." *Jackson v. Harris*, 43 F.2d 513, 616 (10th Cir. 1930).

By contrast, the Tenth Circuit's opinion in this case gives no thought whatsoever to the possibility that the

Due Process Clause might prohibit retroactive application of the radically new and different administrative policies applied by Interior to evaluate conduct occurring long before those policies were foreseeable. Rather than giving serious analysis to this important constitutional question, the Tenth Circuit brushed aside the due process issue, stating only that

> [i]t is implicit in both the Supreme Court's decision in *Hickel* and our court's decision in *Cliffs Synfuel* that neither court was troubled by the fact that DOI regulations suggested that a resumption of assessment work prior to a challenge preserved a claim and that, until 1972, the United States had no interest in whether assessment work was performed.

App. 16. As discussed below, this statement is not true as a matter of fact, and the flippant manner in which the issue was analyzed highlights the importance of intervention by this Court to ensure serious treatment of fundamental due process rights in the future.

Unlike the *Rogers* and *Estate of Donnelly* cases, in which a rational analysis of the facts of the case lead to the conclusion that the changes in the law to be applied retroactively were not unforeseeable, the radical change in the law embodied in the Court's decision in *Hickel*, as interpreted by Interior and the lower courts in the proceedings below, could not reasonably have been foreseen in light of this Court's own prior decisions and the clear, consistent administrative rules of Interior. To hold otherwise, as the courts below did, requires blind reliance on the legal fiction that "the law always meant what the court now says it means", without regard to the reality that during the period at issue, the law has clearly meant something different.

B. THE LEGAL STANDARDS THAT WERE APPLIED IN DECLARING A FORFEITURE OF PETITIONERS' CLAIMS COULD NOT REASONABLY HAVE BEEN ANTICIPATED IN TIME FOR PETITIONERS AND THEIR PREDECESSORS-IN-INTEREST TO CONFORM THEIR CONDUCT TO THOSE STANDARDS.

1. Multiple Changes In Policy Were Applied Retroactively to Support the Decision to Invalidate Petitioners' Claims.

The record reflects that Petitioners and their predecessors consistently complied with the law as it was known and interpreted at the time. Prior to *Hickel* and the change in regulations in 1972, Petitioners and their predecessors-in-interest undisputedly performed some assessment work at various times. After the change in regulations in 1972 to provide for the first time that the Government could challenge claims during a lapse in work, however, Petitioners performed work and filed affidavits of assessment work during their ownership of the Claims until their obligations to perform assessment work ended in the latter 1980s.

Despite this undisputed compliance with the laws and administrative policies in effect at the time the conduct occurred, Interior seeks to invalidate the Claims by judging their maintenance based on new requirements that could not reasonably have been foreseen. These new standards and requirements include: 1) the recognition in *Hickel* and in Interior's 1972 regulation that the Government did have an interest in enforcing compliance with the annual assessment work requirement; 2) Interior's 1993 regulation purporting to abolish the right to resume work set forth in the plain language of the statute; 3) a

new agency policy that road work performed for the purpose of establishing and maintaining access to the claims does not qualify as assessment work; and 4) a recently-adopted characterization of *Hickel* as requiring an objective analysis of literal compliance with Interior's most current view of the assessment work requirement, rather than the subjective test articulated in *Hickel* itself and in *Locke*.

As discussed below, none of these standards could have been anticipated in time for Petitioners and their predecessors-in-interest to conform their conduct to satisfy them.

2. Prior to *Hickel* and Interior's Post-*Hickel* Regulation, It Was Not Foreseeable that Lapses in Assessment Work Would Provide the Government with a Basis to Invalidate an Oil Shale Claim.

The determinations of invalidity of the Claims were based, in large part, on the ALJ's findings that work was not done for many years (but not all years) prior to *Hickel* and the regulations change in 1972. App. 5-6. Absent retroactive application of *Hickel* and Interior's post-*Hickel* change in policy, these findings would not have justified the invalidation of the Claims. Thus, the retroactive application of *Hickel* (leaving aside the resumption issue) and Interior's post-*Hickel* change in policy was essential to the outcome.

For 35 years between 1935 and 1970, this Court's unanimous decisions in *Krushnic* and *Virginia-Colorado* were the definitive statement by this Court on the proper construction of the assessment work requirement. These decisions made clear that the performance of assessment

work was a matter solely between rival claimants and that the Government had no interest in challenging claims for a failure to perform assessment work. *Krushnic*, 280 U.S. at 317-18, 50 S. Ct. at 104-05; *Virginia-Colorado*, 295 U.S. at 645. Moreover, as recognized by Judge Finesilver in subsequent proceedings to address the validity of the very claims at issue in *Hickel*, during the three decades following 1935, Interior followed a "clear, broad-based, and uniform policy . . . which removed non-performance of annual assessment work as a ground for challenge, invalidation, or denial of a patent." *TOSCO v. Morton*, 370 F. Supp. 108, 123 (D. Colo. 1973) (*"TOSCO I"*), *vacated and remanded for comprehensive determinations* (10th Cir. Sept. 22, 1975), *cert. den.*, 426 U.S. 949 (1976).

Both the IBLA and the Tenth Circuit have previously recognized that the state of the law in effect prior to *Hickel* was clear and uniform. As the IBLA stated:

> In the nearly 30 years following *Virginia-Colorado* and *The Shale Oil Co.*, *supra*, the Department was of the official view that default in assessment work was exclusively a matter between rival claimants. That official view was widely disseminated among miners, members of the state and federal legislatures, and governmental agencies, and the public.

United States v. Bohme, 48 I.B.L.A. 267, 87 I.D. 248 (1980).

As stated by the Tenth Circuit,

> Thus, as of 1935, it appeared that the United States had no interest in enforcing the assessment work requirement, and resumption of assessment work before a challenge could "cure" any default in the performance of such work. . . .

> As we observed in Cliffs Synfuel, "[t]he Court ***radically altered*** these two concepts in re-examining the Leasing Act's effect on pre-1920 oil shale claims" in *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970).

App. 10-11 (quoting *Cliffs Synfuel v. Norton*, 291 F.3d 1250, 1258-59 (10th Cir. 2002), *cert. den.*, 537 U.S. 1108 (2003)) (emphasis added).

On remand in *Hickel*, Judge Finesilver recognized the unfairness of retroactively applying Interior's new policy of challenging oil shale claims for historical failures to comply with the annual assessment work requirement. He reasoned,

> The question is not the power of the Secretary of Interior to change regulations and policies of his department; but the basic notion of procedural due process that require[s] government officials to follow the law as it exists until the law is changed, and to notify individuals of the change in law before it is applied against the parties to their detriment.

TOSCO I, 370 F. Supp. at 124; *accord TOSCO II*, 611 F. Supp. at 1165-66 (citing *Shell Oil Co. v. Andrus*, 591 F.2d 597, 603 (10th Cir. 1979), *aff'd*, *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980)).

As Judge Finesilver recognized, based on these clear decisions and agency rules, it was reasonable for claimants to believe, at least until the *Hickel* decision, that past failures to perform annual assessment work were not an obstacle to the issuance of a patent for an oil shale claim. There can be no serious argument that mining claimants between 1930 and 1970 had any fair notice that lapses in annual assessment work could later result in an attempt

by the government to invalidate the claim or refuse to issue a patent.

3. Even After *Hickel*, There Was No Warning Before 1993 that Resumption of Assessment Work Prior to a Challenge by Interior Would Not Preserve a Claim.

Interior did not challenge the Claims until after it changed its regulations in 1993 to abrogate the right to preserve a claim by resuming work. This was several years *after* Exxon's and TOSCO's obligations to perform assessment work had expired and after they had satisfied all other prerequisites for the issuance of patent. Thus, in order to justify its invalidation of the Claims, Interior had to apply retroactively its 1993 regulation.

The 1993 regulation was not foreseeable in light of Interior's clear statement of policy after *Hickel*.[9] The version of 43 C.F.R. § 3851.3(b) in effect after Interior's 1972 change in regulations to respond to *Hickel* expressly stated that failure to do the work would subject a claim to relocation unless "after such failure and before relocation," the work is resumed. In 1991, Interior explained that the 1972 change in policy had only enabled it to contest claims for nonperformance of work "subject to the resumption principle," noting that "The resumption principle is an essential part" of the "Mining Law of 1872". 56 Fed. Reg. 939-940.[10]

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[9] Indeed, the denial of the right to preserve a claim did not appear in the new rule as proposed early in 1993, 58 Fed. Reg. 12878-01 (March 5, 1993), only in the final, 58 Fed. Reg. 38202 (July 15, 1993), 43 C.F.R. § 3851.3(b), (c).

[10] Likewise, nothing in the *Hickel* decision even discusses, let alone foreshadows, the repeal of the resumption right. Moreover, *Hickel*

(Continued on following page)

In light of the clear policy of Interior prior to 1993 expressly recognizing the viability of the right to resume work, there was no fair warning of a rule in 1993 purporting to abolish that right.

4. There Was No Warning Prior to the Challenges to Petitioners' Mining Claims that Lapses in Assessment Work Not Constituting Actual Abandonment Could Forfeit a Claim or that Road Maintenance Work Would Be Disregarded.

As reflected above in the Statement of the Case, the first indication that intent was irrelevant to loss of any of the Claims due to a work lapse and that the subjective standard set forth in *Hickel* and *Locke* would not apply, did not appear until years after Petitioners' obligations to perform work ended. The unfairness of such retroactivity is manifest.

This unfairness is particularly clear respecting the road maintenance work that Exxon undisputedly performed in the 1970s and 1980s and documented in affidavits of annual assessment work. The ALJ disregarded that work as "non-qualifying" and concluded that it was as if no assessment work at all had been performed during those years, wholly ignoring Exxon's intent. App. 55-56. This conclusion required the retroactive application of an additional new rule that was not announced until the early 1990s, long after the work had already been done and after Exxon had done everything else required to

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expressly stated that it was ***not*** overruling *Krushnic*, which confirmed the continued existence of the resumption right.

secure a patent. This rule, that work performed on access roads for the purpose of providing access to mining claims was not *qualifying* assessment work, was a complete repudiation of prior agency policy, which had long been to recognize road work as assessment work. *See, e.g., Standard Shales Prods. Co.*, 52 L.D. 522, 523-26 (1928). Once again, Interior was able to effectuate a forfeiture of Exxon's Claims only through the retroactive application of a new standard that flatly contradicted clear prior pronouncements by the agency and this Court.

As discussed in Part I, Petitioners believe that Interior's interpretation of *Hickel*, that resumption of work prior to a work-lapse challenge does not preserve a claim, is incorrect. Even if the interpretation were correct, however, it is a vastly different articulation of the "substantial compliance" standard than was discussed in *Hickel* and articulated in *Locke*; no fair warning was given that lapses in assessment work not constituting actual abandonment could be deemed to invalidate a mining claim. No finding of abandonment has been made in this case, and Interior has never claimed that any of the Claims lapsed due to abandonment, possibly because there was no evidence of an "act evincing an intention to give up and renounce" a property interest. *Farrell v. Lockhart*, 210 U.S. 142, 148 (1908) (cited in *Virginia-Colorado*). Rather, the analyses below focused solely on whether the work performed constituted literal compliance with what Interior *now* considers to be "qualifying" assessment work. In this way, Interior and the Tenth Circuit piled legal fiction upon legal fiction to justify a result that common sense tells us could never have been imagined by a reasonable claimant, allowing him to conform his conduct in advance.

C. THIS CASE IS ONE OF THE "RARE" CASES DISCUSSED IN *ESTATE OF DONNELLY* WHERE RETROACTIVE APPLICATION OF A NEW INTERPRETATION OF A STATUTE WOULD FRUSTRATE REASONABLE RELIANCE ON CLEAR PRECEDENTS IN A MANNER THAT VIOLATES DUE PROCESS.

For the reasons discussed in Part II.B, there can be little argument that no reasonable mining claimant in the 1930s, 40s, 50s, or 60s could have predicted the radical changes in the interpretation of the assessment work requirement that followed *Hickel* and Interior's related regulations and policy change in 1972. Similarly, there can be little argument that a mining claimant in the 1970s and 1980s could have predicted the 1993 shift in Interior's policy and regulations that repudiated the resumption right and radically changed its own prior interpretations of *Hickel*. Therefore, this is truly the type of case discussed in *Estate of Donnelly* where "justified reliance" exists sufficient to preclude retroactive application. *See Estate of Donnelly*, 397 U.S. at 295, 90 S. Ct. at 1038.

The unfair impacts of application of radically new policies in the 1970s and 1990s to conduct occurring decades earlier are obvious. First, the clear prior state of the law provided no incentive to perform or document assessment work on an annual basis. The law before *Hickel* was clear that the government could not challenge a mining claim for lack of assessment work. Under the Mineral Leasing Act, there was no threat of a relocation by rival claimants. Moreover, during this time, there was no regulatory or other requirement that a claimant file an affidavit of annual assessment work. All of these factors

combined to provide scant incentive to perform, and more important, to *document* annual assessment work.[11] Second, Petitioners made significant investments with regard to their claims based on the reasonable belief that they were valid, patentable claims. When Exxon and TOSCO purchased the Claims, they had no reason to think that they needed to conduct due diligence to investigate the past performance of assessment work by their predecessors in interest and subsequently preparing applications to patent the Claims and investing billions of dollars in developing water rights and technology aimed at the production of shale oil.

In addition, unlike the situation in *Estate of Donnelly*, this is not a case in which the rights claimed are the right to a judicial decision itself. *See Rosebud Sioux Tribe*, 900 F.2d at 1173 (citing *Estate of Donnelly* in recognizing the proposition that a party does not have a vested right in a judicial decision but holding that this principle does not apply where other rights are to be lost as a result of reliance on clear prior interpretation of the same statute). Here, the rights to be lost if the new rules and policies are applied retroactively are *other* property rights, namely, the Claims. If the Tenth Circuit's decision is allowed to stand, these constitutionally protected property interests will be

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[11] Given the absence of any affidavit requirement, very little written documentation of assessment work performed prior to claimants' purchases of the Claims was available in 1995. There thus was no way to prove performance of assessment work as far back as 1920. Few, if any, individuals could have been identified who could testify about such work (none were).

forfeited because of the imposition of standards for maintaining those interests at a time in the past when no reasonable person could have known existed.[12]

D. THE TENTH CIRCUIT'S ANALYSIS WAS WHOLLY INADEQUATE TO ANSWER THE IMPORTANT DUE PROCESS CONSIDERATIONS INHERENT IN INTERIOR'S DECISION.

As shown above, the retroactive application of Interior's repeated changes of policies raises serious due process concerns. The Tenth Circuit's flippant statement that the Court in *Hickel* and the Tenth Circuit in *Synfuel* were "not troubled" by the lack of prior warning, was wholly inadequate to dispose of this important constitutional question. Neither *Hickel* nor the Tenth Circuit in *Synfuel* had the opportunity to address the due process issues raised in this case. In *Hickel*, the Court expressly remanded the retroactivity issue to the lower courts for a determination. 400 U.S. at 58 (discussing contention "that this administrative rule of 35 years, upon which the Department itself has relied, may not now be retroactively changed"). Ultimately, Interior's challenge to the claims at

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[12] There can be no question that an unpatented mining claim is a property interest deserving of due process protection. Initiation of a valid claim "has the effect of a grant by the United States of the right to present and exclusive possession. The claim is property in the fullest sense of that term." *Virginia-Colorado*, 295 U.S. at 644, 555 Ct. at 889 (quoting *Krushnic*, 280 U.S. at 316) (emphasis added). These principles were recognized long before *Krushnic*. In *Forbes v. Gracey* the Court held that once there is a valid discovery and proper location of a mining claim, the claim is "real property in the highest sense." 94 U.S. 762, 767 (1876); *see also Bradford v. Morrison*, 212 U.S. 389, 395 (1909); *Elder v. Wood*, 208 U.S. 226, 264 (1908).

issue in *Hickel* failed on retroactivity grounds. *TOSCO II*, 611 F. Supp. at 1165-66. In *Synfuel*, no due process issue was ever raised prior to its Petition for Writ of Certiorari. To say that no due process violation can be found here because the courts in those cases were not concerned with due process considerations is absurd. The unfairness and deprivation of protected property interests demand a more thoughtful analysis.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their Petition for issuance of a *Writ of Certiorari*.

Respectfully submitted by:

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Dated: January 12, 2004.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

EXXON MOBIL CORPORATION, f/k/a Exxon Corporation; and TOSCO CORPORATION, Plaintiffs-Appellants, v. GALE NORTON, Secretary of the Interior; DEPARTMENT OF INTERIOR; KATHLEEN CLARKE, Director of the Bureau of Land Management, United States Department of Interior; DOUGLAS M. KOZA, Associate Director of the Colorado State Office of the Bureau of Land Management, Defendants-Appellees.*	No. 02-1344

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. NO. 00-M-2524 (PAC))

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* Pursuant To Fed. R. App. P. 43(c)(2), Gale Norton is substituted for Bruce Babbitt, Kathleen Clarke is substituted for Thomas Fry, and Douglas M. Koza is substituted for Ann Morgan as the appellees in this action.

(Filed Oct. 15, 2003)

James A. Clark, Baker & Hostetler, LLP, Denver, Colorado, for Plaintiff-Appellant Exxon Mobil Corporation, and Donald L. Morgan, Cleary, Gottlieb, Steen & Hamilton, Washington, D.C., for Plaintiff-Appellant TOSCO Corporation.

Ellen J. Durkee, Attorney, Environment & Natural Resources Division, Department of Justice, Washington, D.C. (Thomas L. Sansonetti, Assistant Attorney General, Washington, D.C.; Katherine Hazard, Attorney, Environment & Natural Resources Division, Department of Justice, Washington, D.C.; Lyle Rising, Office of the Solicitor, Lakewood, Colorado; and Karen Hawbecker, Office of the Solicitor, Washington, D.C., with her on the briefs), for Defendants-Appellees.

Before **TACHA**, Chief Judge, and **ANDERSON** and **BRISCOE**, Circuit Judges.

ANDERSON, Circuit Judge.

Plaintiffs Exxon Mobil Corporation and TOSCO Corporation appeal the district court's judgment affirming the Interior Board of Land Appeals ("IBLA") decision invalidating their thirty-two unpatented oil shale mining claims. The IBLA concluded that the claims were null and void because plaintiffs had failed to substantially perform the assessment work required by statute. We affirm.

BACKGROUND

Exxon has twenty and TOSCO has twelve unpatented oil shale mining claims located in the Piceance Creek Basin in Garfield County, Colorado. Exxon and TOSCO acquired these claims from their previous owners, who had located them prior to February 25, 1920, in accordance with the General Mining Law of 1872, 30 U.S.C. §§ 21-54.

That law, "premised on a policy of encouraging exploration of valuable mineral deposits in the western United States. . . . provides that one who claims a mineral deposit is known as a 'locator' and is required to perform a certain amount of work each year in prosecution of the claim site, known as the 'location.'" *Cliffs Synfuel Corp. v. Norton,* 291 F.3d 1250, 1252-53 (10th Cir. 2002). That annual work requirement, called assessment work, is described in the 1872 Law as follows:

> On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year.

30 U.S.C. § 28. The Mining Law further contained a provision stating that if a claimant failed to perform the required assessment work for a period of time but later resumed such work before someone else asserted a claim to the same land, the original claimant did not lose his claim. This provision became known as the "resumption doctrine":

> [U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever

> been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

Id.; *see also Cliffs Synfuel,* 291 F.3d at 1253.

With the passage of the Mineral Leasing Act in 1920, Congress "completely changed the national policy over the disposition of oil shale lands." *Hickel v. Oil Shale Corp.,* 400 U.S. 48, 51 (1970). Those lands "were no longer open to location and acquisition of title but only to lease." *Id.* The Act contained a savings clause, however, which provided that oil shale claims in existence as of February 25, 1920, remained intact, and could pass into private ownership as before, as long as they were "thereafter maintained in compliance with the laws under which initiated. . . ." 30 U.S.C. § 193. "Thus, if one had a claim that existed prior to February 25, 1920, the claimant would not be required to lease the claimed land from the government, but could perfect title to it so long as the claim was maintained pursuant to pre 1920 law." *Cliffs Synfuel,* 291 F.3d at 1254.

With that general background in mind, we turn to the particular facts of plaintiffs' claims. Exxon's twenty claims were located by its predecessor-in-interest on December 1, 1919. Exxon purchased those twenty claims and fifty-two others on February 2, 1966, for $100.00. TOSCO's twelve claims were located by its predecessor-in-interest on December 16, 1917. TOSCO purchased them on April 23, 1979 for $9,562.10.

Exxon filed a patent application for its claims in January 1984. TOSCO filed its patent application in June 1985. On June 15, 1989, the Department of the Interior

("DOI") determined that Exxon had complied with the initial paperwork requirements of the Mineral Leasing Act and issued First Half of Mineral Entry Final Certificates ("FHFC"s).[1] On July 27, 1988, DOI issued FHFCs for TOSCO's claims. Issuance of those FHFCs relieved plaintiffs of the obligation to perform further assessment work. *See Silver Crystal Mines, Inc.,* 147 I.B.L.A. 146, 149 (1999). DOI continued to investigate the validity of the claims, however, and on May 3, 1995, the Bureau of Land Management ("BLM") initiated a contest of Exxon's claims and on May 25, 1995 initiated a contest of TOSCO's claims.

The two contest complaints were consolidated for a hearing before an Administrative Law Judge ("ALJ"). The ALJ issued a decision on January 9, 1998, holding, *inter alia,* that plaintiffs' claims were invalid because plaintiffs failed to comply substantially with the annual assessment work requirement of 30 U.S.C. § 28.[2] More specifically, the ALJ concluded that TOSCO had failed to perform the required assessment work on its claims for the years 1929 through 1931, 1933 through 1957, and 1960 through 1974, with the exception that no assessment work was required

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[1] The issuance of an FHFC is "the DOI's administrative recording of an applicant's compliance with the initial paperwork requirement of the Mining Law. But, a patent is not issued until there has been a determination that the claim is valid." *Independence Mining Co. v. Babbitt,* 105 F.3d 502, 506 (9th Cir. 1997).

[2] The BLM complaints also charged that plaintiffs' claims were invalid because none of them contained a discovery of a valuable mineral deposit, a necessity for a valid mining claim. *See* 30 U.S.C. § 22. The ALJ rejected the BLM's challenge, finding that plaintiffs' claims satisfy the discovery test.

for six of the claims in 1935 because a notice of intent to hold those claims was filed for that year. The ALJ found that TOSCO did satisfy the assessment work requirement for the years 1975 through 1987.

The ALJ found that, with respect to Exxon's claims, annual assessment work was required from 1919 to 1988, with the exception of 1932. The ALJ concluded that assessment work had been done for each of Exxon's claims in 1957, 1958, 1964 and 1966, and that assessment work had been done for a one-year period on approximately ten claims sometime between 1967 and 1972. Except for those time periods, the ALJ determined that no other assessment work had been done on Exxon's claims between 1920 and 1972. Exxon filed affidavits stating that it had performed assessment work for the years 1973 through 1988, but the ALJ determined that it was non-qualifying road maintenance work.

Exxon and TOSCO appealed the ALJ's decision to the IBLA. The IBLA affirmed the ALJ's decision, for substantially the same reasons as the ALJ. Thus, the IBLA concluded that plaintiffs had failed to substantially satisfy the assessment work requirement of 30 U.S.C. § 28.[3]

Plaintiffs sought review of the IBLA's decision in the federal district court. They argued that 30 U.S.C. § 28, which created the assessment work obligation, also included the resumption doctrine and that their asserted

[3] The IBLA set aside the ALJ's decision with respect to the discovery issue, on the ground that it was unnecessary to reach it given its determination that the claims were void for failure to substantially comply with the assessment work requirement.

resumption of assessment work prior to the government's challenge cured their prior lapse in assessment work. Plaintiffs also argued that the DOI's own regulations at the time had recognized the resumption doctrine and that the government is estopped from retroactively denying them the benefit of those regulations. The district court rejected this argument. *Exxon Mobil Corp. v. Norton,* 206 F. Supp. 2d 1085, 1089 (D. Colo. 2002). The court further found that there was sufficient evidence in the record supporting the IBLA's holding that there was a substantial lapse in assessment work. Finally, the district court rejected plaintiffs' estoppel claim, as well as their arguments that their due process and equal protection rights were violated. It declined to rule on the ALJ's decision regarding discovery.

Plaintiffs appeal, arguing, as they did below, that, despite the non-performance of assessment work decades earlier, they resumed assessment work prior to the government's challenge to the validity of their claims, in reliance upon two Supreme Court decisions and DOI regulations following those decisions which: (a) provided that such resumption preserved the validity of a claim and (b) until 1972, provided that the United States "had no interest in whether assessment work was performed at all." Plaintiffs-Appellants' Br. at 2. Thus, they argue that the IBLA's decision violates due process and equal protection principles "in view of settled law . . . enunciated in unanimous Supreme Court decisions, Interior's regulations, and Interior's practices in patenting other oil shale claims with similar apparent lapses in work." *Id.* Plaintiffs also allege that DOI failed to establish by clear and convincing evidence that assessment work had not been done in prior decades and failed to establish that plaintiffs did

not in fact substantially comply with the assessment work requirement. Finally, they argue that DOI erred in determining that certain road maintenance work performed by Exxon was not qualifying assessment work; that their performance of at least $500 worth of work per claim satisfies the substantial compliance requirement; and that the IBLA decision was erroneously premised on the idea that the resumption doctrine no longer exists.

DISCUSSION

"'[I]n reviewing a district court's review of an agency decision, the identical standard of review is employed at both levels; and once appealed, the district court's decision is accorded no particular deference.'" *Cliffs Synfuel,* 291 F.3d at 1256-57 (quoting *Valley Camp of Utah, Inc. v. Babbitt,* 24 F.3d 1263, 1267 (10th Cir. 1994)) (further quotation omitted). Further, the Administrative Procedure Act applies, under which:

> in reviewing the underlying agency decision denying [plaintiffs'] application[s] for . . . patent[s], the standard is whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The duty of a court reviewing agency action under the 'arbitrary or capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made."

Id. at 1257 (quoting *Olenhouse v. Commodity Credit Corp.,* 42 F.3d 1560, 1574 (10th Cir. 1994) (footnote omitted)). When we review the agency's explanation, we must decide "'whether the agency considered all relevant factors and

whether there has been a clear error of judgment.'" *Id.* (quoting *IMC Kalium Carlsbad, Inc. v. Interior Bd. of Land Appeals,* 206 F.3d 1003, 1012 (10th Cir. 2000)) (further quotation omitted). The Supreme Court has cautioned that "the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971); *see also Cliffs Synfuel,* 291 F.3d at 1257. In sum, "we review the IBLA's decision to determine whether it was supported by substantial evidence and was not arbitrary or capricious," or was not in accordance with the law. *IMC Kalium Carlsbad,* 206 F.3d at 1010.

I. Due Process/Retroactivity/Equal Protection

Plaintiffs' first argument is that the IBLA's decision violated their due process rights by retroactively barring them from relying upon valid Supreme Court decisions and DOI regulations following those decisions when they invoked the resumption doctrine to preserve their claims prior to the government's challenge to the validity of those claims. As indicated, the General Mining Law of 1872 required "[o]n each claim located . . . not less than $100 worth of labor . . . or improvements . . . each year. . . ." 30 U.S.C. § 28. Under the savings clause of the 1920 Act, claims, like those of plaintiffs, located prior to the enactment of the Act could be subject to patent and therefore private ownership rather than only leasehold if "thereafter maintained in compliance with the laws under which initiated." 30 U.S.C. § 193.

Initially, the Supreme Court suggested that, while a claimant is required to perform the $100 of annual assessment work, "failure to do so does not ipso facto forfeit

the claim, but only renders it subject to loss by relocation." *Wilbur v. United States ex rel. Krushnic,* 280 U.S. 306, 317 (1930). However, the Court stated that "the law is clear that no relocation can be made if work be resumed after default and before such relocation." *Id.*; *see also Cliffs Synfuel,* 291 F.3d at 1258 (noting that "even after the enactment of the Mineral Leasing Act, an owner of a pre 1920 oil shale claim was under no obligation to perform the requisite assessment work on an annual basis so long as they were able to avail themselves of the resumption doctrine before the claim was relocated by a subsequent claimant") (citing *Krushnic,* 280 U.S. at 317). The Court further suggested that the annual assessment work requirement "'was not necessary to preserve the possessory right . . . as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect.'" *Ickes v. Virginia-Colorado Dev. Corp.,* 295 U.S. 639, 645 (1935) (quoting *Krushnic,* 280 U.S. at 317). Thus, as of 1935, it appeared that the United States had no interest in enforcing the assessment work requirement, and resumption of assessment work before a challenge could "cure" any default in the performance of such work. Plaintiffs argue that they relied upon those decisions, and DOI regulations following them, in failing to perform annual assessment work for decades.

As we observed in *Cliffs Synfuel,* "[t]he Court radically altered these two concepts in re-examining the Leasing Act's effect on pre-1920 oil shale claims" in *Hickel v. Oil Shale Corp.,* 400 U.S. 48 (1970):

> The Court first rejected its earlier formulations that had declared the government to be a disinterested party, unable to assert rights to a

> pre-1920 oil shale claim upon which assessment work had been discontinued. It stated that "if we assume, *arguendo,* that failure to do assessment work as provided in the 1872 Act concerned at the time only the claimant and any subsequent relocator, the United States, speaking through the Secretary of the Interior, became a vitally interested party by reason of the 1920 Act."

Cliffs Synfuel, 291 F.3d at 1258-59 (quoting *Hickel,* 400 U.S. at 53). As the *Hickel* Court further explained:

> If we were to hold to the contrary that enforcement of the assessment work of § 28 was solely at the private initiative of relocators, the "maintenance" provision of § 37 becomes largely illusory, because relocation of oil shale claims became impossible after the 1920 Act. So if enforcement of the assessment work requirement of § 28 were dependent solely on the activities and energies of oil shale relocators, there was no effective enforcement device.

Hickel, 400 U.S. at 56.

In reviewing its prior decisions in *Krushnic* and *Virginia-Colorado,* the Court in *Hickel* largely confined them to their facts, agreeing with their specific holdings that "every default in assessment work does not cause the claim to be lost."[4] *Id.* at 57. Stating that "[d]efaults . . .

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[4] Both *Krushnic* and *Virginia-Colorado* involved brief defaults in the performance of assessment work. In *Krushnic,* the claimant defaulted for one year and then resumed work before the United States challenged the claim. In *Virginia-Colorado,* the claimant had defaulted for a similar time period, but had stated its intention to resume

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might be the equivalent of abandonment[,]" however, the Court specifically held "that token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28, is not adequate to 'maintain' the claims within the meaning of § 37 of the Leasing Act." *Id.* Characterizing the broad language of *Krushnic* and *Virginia-Colorado* as dicta, the Court concluded that "they must be confined to situations where there had been substantial compliance with the assessment work requirements of the 1872 Act, so that the 'possessory title' of the claimant, granted by 30 U.S.C. § 26, will not be disturbed on flimsy or insubstantial grounds." *Id.* Further, the Court made it clear that upon default in the performance of assessment work, the United States was the beneficiary: "While the objective of the 1872 Act was to open the lands 'to a beneficial use by some other party,' once the original claimant defaulted, the defeasance inevitably accrued to the United States, owner of the fee." *Id.* at 55. Indeed, "§ 37 of the 1920 Act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise." *Id.* at 57.[5]

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assessment work and had made plans to do so when the United States challenged claim.

[5] Prior to *Hickel,* applicable regulations tracked the *Krushnic* and *Virginia-Colorado* language that defaults in performance of the annual assessment work were a matter of concern only to third parties or rival locators, not the United States. In 1972, DOI amended its regulations to reflect *Hickel*'s holding. Thus, they provide that a mining claimant's failure "to comply substantially with the requirement" of the annual assessment work "will render the claim subject to cancellation." 43 C.F.R. § 3851.3(a). In 1993, the Department added that "failure to perform the assessment work . . . causes the interest of the claimant(s)

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In *Cliffs Synfuel,* we discussed and applied *Hickel* to a case very similar to this case. Claimants in *Cliffs Synfuel* had performed assessment work from 1918 until 1930 and had resumed such assessment work from 1977 until 1992, prior to any challenge by the United States, but "no assessment work was performed during the 46-year period stretching from July 1, 1931 to September 1, 1977." *Cliffs Synfuel,* 291 F.3d at 1260. We explained our view of *Hickel* as follows:

> From the Court's statement "that *every* default in assessment work does not cause the claim to be lost," it logically follows that in each case we must consider the quantum of the actual assessment work performed and the length of time the claimant failed to meet the annual assessment work required by the Mining Act of 1872.

Id. at 1259 (quoting *Hickel,* 400 U.S. at 57). We compared the facts of *Hickel,* where the Court found the claimants had not substantially complied with the assessment work

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in the minerals subject to the mining laws to revert back to the public domain." 43 C.F.R. § 3851.3(b).

In the Energy Policy Act of 1992, Congress modified the annual assessment work requirements for oil shale applicants who, unlike plaintiffs here, had not received FHFCs. The holder of a valid unpatented oil shale claim may retain an unpatented claim "by complying with the general mining laws of the United States . . . except that the claim holder shall no longer be required to perform annual labor, and instead shall pay to the Secretary $550 per claim per year . . . commencing with calendar year 1993." 30 U.S.C. § 242(c)(3), (e)(2). Additionally, the applicant may only receive a patent for the oil shale and associated minerals, while title to the surface and all other minerals remains in the United States. 30 U.S.C. § 242(c)(1).

requirement, with those of *Krushnic* and *Virginia-Colorado,* where the Court found the claimants had substantially complied with the assessment work requirement. Noting that in *Hickel,* "[a]nnual assessment work had basically ceased prior to the 1930's as well as in the twenty years thereafter," *id.,* as compared with the brief, one-year defaults in *Krushnic* and *Virginia-Colorado,* we concluded that the facts in *Cliffs Synfuel* "are decidedly more similar to the situation which confronted the Court in *Hickel,* rather than in *Krushnic* or *Virginia-Colorado.*" *Id.* at 1260. We concluded that "[u]nder these circumstances our decision is driven by the facts and reasoning set forth in *Hickel.*" *Id.*

Significantly, while we did not hold that the resumption doctrine is completely inapplicable to oil shale claims, we explained its limits.[6] The claimant in *Cliffs Synfuel* had argued that its resumption of assessment work in 1977, after a 46-year period of inactivity, but prior to any challenge to the validity of its claim by the United States, had revived its claim. We held it did not:

> On the basis of *Hickel*'s teachings, we conclude that the 46 years of inaction on Appellee's claims reflects "token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28. . . ." Therefore, in this case, "the 1920 Act makes the United

[6] Plaintiffs argue that we should reverse the IBLA decision because it "was premised on the erroneous notion that the right to preserve a claim by resuming work no longer exists." Plaintiffs-Appellants' Br. at 3. We see no such basis for reversing the IBLA's decision.

> States the beneficiary of all claims invalid for lack of assessment work or otherwise."

Id. at 1261 (quoting *Hickel,* 400 U.S. at 57). We went on to state:

> In so concluding, we perforce reject Appellee's suggestion that its assessment work, which took place from 1977 through 1992, offsets the previous 46 years of dereliction and restores a legitimate right to the claims by constituting more than "token assessment work." The short answer to this is that by appropriate analogy, this argument was rejected by the Court in *Hickel* when it noted that a decades-long lapse on assessment work "might be the equivalent of abandonment. . . ." Applying the rationale of the Court, we hold that prior to 1977 Appellee's "default in doing the assessment work . . . ma[de] the United States the beneficiary of all claims invalid for lack of assessment work" long before it resumed assessment work in 1977. Appellee's activity that began in 1977 was too little, too late.

Id. (quoting *Hickel,* 400 U.S. at 57).

We hold that the rationale and facts of *Hickel* and *Cliffs Synfuel* compel the same result in this case. Assuming substantial evidence supports the ALJ's finding that plaintiffs failed to perform the required assessment work for several decades (in Exxon's case, many decades), that "'default in doing the assessment work . . . ma[de] the United States the beneficiary of all claims invalid for lack of assessment work'" despite any claimed resumption in the 1970s prior to the government's challenge to the validity of plaintiffs' claims. *Id.*

Plaintiffs attempt to avoid the sweep of *Hickel* and *Cliffs Synfuel* by arguing that those cases did not address the due process retroactivity argument plaintiffs press upon us here. We disagree. It is implicit in both the Supreme Court's decision in *Hickel* and our court's decision in *Cliffs Synfuel* that neither court was troubled by the fact that DOI regulations suggested that resumption of assessment work prior to a challenge preserved a claim and that, until 1972, the United States had no interest in whether assessment work was performed. To the extent plaintiffs argue they were entitled to rely upon *Krushnic* and *Virginia-Colorado,* the Supreme Court in *Hickel* in 1970 confined those cases to their particular facts (upholding the validity of claims where assessment work was resumed after a one-year lapse in the performance of such work) and made it clear that the United States was interested in the enforcement of the assessment work requirements, and indeed was the beneficiary of an abandoned claim, as a matter of *statutory* interpretation. In short, our decision in *Cliffs Synfuel,* interpreting and applying *Hickel,* dictates the conclusion we reach here – that plaintiffs' claims are invalid for failure to substantially comply with the annual assessment requirement, and that they became invalid long before plaintiffs resumed, or attempted to resume, assessment work, provided we find substantial evidence supports the ALJ's findings on the quantum of assessment work performed.[7] We turn therefore to that issue.

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[7] Plaintiffs also argue that the determination that their claims are invalid, while other claims they assert are similarly situated to theirs have gone to patent during this same general time period, violates their

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II. Substantial Compliance with Annual Assessment Requirement

Plaintiffs argue: (1) DOI failed to "establish by clear and convincing evidence that work had not been done in long-past years," Plaintiffs-Appellants' Br. at 3; (2) DOI erroneously disqualified as assessment work road-maintenance work performed by Exxon; (3) plaintiffs satisfied the substantial compliance requirement of *Hickel*; and (4) plaintiffs' performance of $500 worth of work per claim, which is required to qualify for issuance of a patent, satisfies the assessment work requirement.

"[F]orfeiture of a mining claim for failure to do annual labor must be established by clear and convincing proof that the former owner has failed to have performed the required work or made the necessary improvements." *United States v. Herr,* 130 I.B.L.A. 349, 358 (1994). In reviewing the IBLA's application of that standard, we must determine whether its conclusion that there was clear and convincing proof that plaintiffs had failed to perform the required assessment work was arbitrary, capricious or an abuse of discretion, or is unsupported by sufficient evidence in the record. We hold that it was not arbitrary, capricious, or an abuse of discretion, and enjoys sufficient evidentiary support in the record.

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equal protection rights. We disagree. Assuming the other claimants whom plaintiffs assert have received patents are in fact similarly situated, a fact of which we have no proof, enforcement of the annual assessment work requirement furthers a legitimate governmental interest. *See Grigsby v. Barnhart,* 294 F.3d 1215, 1220 (10th Cir. 2002).

Plaintiffs argue the IBLA's decision upholding the ALJ is supported by nothing more than speculation and conjecture. After carefully reviewing the administrative record, we disagree with that assertion. The ALJ reviewed reports prepared by mining engineers and examiners who conducted on-site inspections, reviews and interviews in 1928, 1931, 1984, 1986, 1993 and 1995. Mineral reports were prepared on both plaintiffs' patent applications. Aerial photographs taken at various times were examined.[8]

While plaintiffs assert that the ALJ simply made unfounded speculations about decades-old activities, we view the ALJ's analysis, affirmed by the IBLA, as articulating a rational connection between the facts found and the decision made.[9]

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[8] Aerial photographs of the Exxon claim group were taken in 1954, 1962, 1966, 1967, 1973, 1979, 1980, and 1981. ALJ Decision at 14, Deferred Jt. App. at 2561.

[9] The ALJ found as follows with respect to TOSCO's claims:

> With the exception of core hole drilling in 1958 and/or 1959, evidence of assessment work for the period of 1929 through 1974 was not found by the examiners either in the records or on the claims. [BLM mining engineer and mineral examiner] Mr. Ginouves noticed surface disturbances, including trails, in a 1954 aerial photograph of the claim group, but attributed their existence to various grazing improvements and activities. The improvements consisted of fencelines, stock-watering catchments, and betterments to natural springs. The location and termination points of the trails revealed their association with use of these improvements. A comparison of aerial photographs from 1954, 1962, and 1978 indicated that most of the road network and many of the grazing improvements were in place as early as 1954, and that very few additional disturbances are visible in the 1962 and 1978 photos.

ALJ Decision at 11, Deferred Jt. App. at 2558.

Plaintiffs argue that the possibility of erosion, revegetation, and other natural forces makes it extremely difficult to accurately assess the condition of the terrain, particularly any assessment work done in prior years. The ALJ explained, however, why DOI examiners were able to accurately evaluate the assessment work despite the undeniable influence of weather on the terrain:

> While erosion, revegetation, and vegetation density are factors adversely affecting a field examiner's ability to locate assessment work, the Departmental examiners were thorough in their examination and have shown that small excavations dating back to the 1920's (the pits on the TOSCO claims and those nearby but outside of the Exxon claim group) can be located with a high degree of success.

ALJ Decision at 49, Deferred Jt. App. at 2596. Moreover, as we have stated, "[t]he IBLA may draw reasonable inferences from the evidence." *IMC Kalium Carlsbad,* 206 F.3d at 1011. The ALJ recognized the possibility that work done long ago on the TOSCO claims might be difficult to detect, but he concluded that the evidence supported the conclusion that "such work, under the circumstances, likely was not performed and would not be qualifying in nature":

> Those circumstances include the absence of any evidence of excavations, drill holes, or other mining activity for the assessment years ending in 1929 through 1957 and the assessment years ending in 1960 through 1974, the lack of economic incentive to develop the claims, and the fact that most of the trails and roads are likely associated with improvements and activities related to grazing rather than mining. For these

> periods, there is no evidence of mining activity, and little evidence of the likelihood thereof, which might necessitate road maintenance to allow access.

ALJ Decision at 45, Deferred. Jt. App. at 2592.

Plaintiffs argue further that the ALJ and IBLA were "hyper-technical" in their approach to plaintiffs' claim that their development of water sources and rights should be considered assessment work. The ALJ and IBLA rejected the water work as qualifying assessment work:

> [Plaintiffs'] efforts to develop an economically viable oil shale industry have little, if any, relevance in determining whether compliance with the assessment work has been sufficiently substantial to demonstrate a diligent good faith effort to develop *the specific mining claims being contested.* A claimant may show no inclination or effort to develop a particular set of claims and yet display a keen interest in expending time and money to develop a viable industry for recovering the mineral which happens to exist on those and many other claims. While some of the expenditures relating to the acquisition and development of water sources and rights relate more directly to these particular claims, the water is not needed for extraction of the oil shale but for retorting and other processes. It therefore does not qualify as assessment work. Further, because these water expenditures benefit other nearby patented claims held by [plaintiffs], their tendency to show the good faith of [plaintiffs] in developing the contested claims is slight at best.

ALJ Decision at 41-42, Deferred Jt. App. at 2588-89 (citation omitted).

Having carefully reviewed the record, we cannot say that the ALJ's careful and thorough decision, affirmed by the IBLA, concluding that DOI had demonstrated by clear and convincing evidence that plaintiffs had not substantially complied with the annual assessment work requirement, is arbitrary or capricious, and we find it has adequate support in the record.

Plaintiffs make several more specific arguments, which we address in turn. Exxon argues the IBLA erred in disqualifying as assessment work certain road work it performed. For the years 1973 through 1988, with the possible exception of the year 1974, Exxon filed affidavits stating that it did assessment work of at least $100 per claim. It is undisputed that the work was done. It was exclusively road maintenance work, which the ALJ and the IBLA held was not qualifying assessment work. All parties agree that road maintenance work can qualify as assessment work, provided it is done "for the purpose of better developing and operating" the claim. *United States v. 9,947.71 Acres of Land,* 220 F. Supp. 328, 332 (D. Nev. 1963) (further quotation omitted); *accord Silliman v. Powell,* 642 P.2d 388, 393 (Utah 1982) ("Road work that directly facilitates the extraction of minerals from claims clearly qualifies as assessment work."). The IBLA rejected Exxon's road maintenance as qualifying assessment work:

> There is not one shred of evidence that the purpose of the road maintenance was to facilitate development of the claims. Unlike the nearby oil and gas road, the poor roads leading to and traversing the claims were not improved to allow passage of heavy equipment necessary for drilling or other development activity, but rather, they were merely maintained. The roads do not lead to any excavations or other mining activity

> performed or planned subsequent to 1973 because there have been none.

United States v. TOSCO Corp., 153 I.B.L.A. 205, 209 (2000) (quoting ALJ Decision at 49, Deferred Jt. App. at 2596). That conclusion is not arbitrary or capricious and is supported by substantial evidence in the record.

Plaintiffs also argue that their performance of $500 worth of work per claim, which 30 U.S.C. § 29 requires for the issuance of a patent, satisfies the annual assessment work requirement of 30 U.S.C. § 28. The ALJ, the IBLA, and the district court all rejected this argument, as do we. As the ALJ explained, §§ 28 and 29 "serve two distinct purposes and have distinct minimum standards." ALJ Decision at 40, Deferred Jt. App. at 2587. The $100 annual assessment requirement is "to assure that a claimant undertakes a diligent good faith effort to develop the mining claim, and to prevent the location of mining claims for speculative purposes." *Id.* The $500 requirement before issuance of a patent exists because "Congress believed that the expenditure of that amount of money, whether in 1 year or 5 years, would demonstrate a claim's value as a mine." *Id.* We have never suggested that there is a $500 cap on the annual assessment work requirement. *See Cliffs Synfuel,* 291 F.3d at 1261 (implicitly requiring assessment work totaling more than $500); *see also Andrus v. Shell Oil Co.*, 446 U.S. 657, 658 n.1 (1980) ("The mining law also provides that until a patent is issued a claimant must perform $100 worth of labor or make $100 [sic] of improvements on his claim *during each year*. . . .") (emphasis added). In short, we agree that the $500 worth of work requirement is separate from and does not satisfy the statutory obligation to perform $100 worth of work each year on each claim.

For the foregoing reasons, we AFFIRM the district court's decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Chief Judge

Civil Action No. 00-B-2524 (PAC) (consolidated with 00-B-2536)

EXXON MOBIL CORPORATION, f/k/a EXXON CORPORATION, a New Jersey corporation; and TOSCO CORPORATION

Plaintiffs,

v.

GALE NORTON, Secretary of the United States Department of the Interior; THE UNITED STATES DEPARTMENT OF THE INTERIOR; THOMAS FRY, Acting Director of the Bureau of Land Management, United States Department of the Interior; and ANN MORGAN, Director of the Colorado State Office of the Bureau of Land Management,

Defendants.

MEMORANDUM, OPINION, AND ORDER

(Filed May 29, 2002)

Babcock, C.J.,

Plaintiffs Exxon Mobil Corporation ("Exxon") and Tosco Corporation ("Tosco") seek reversal of the Interior Board of Land Appeals ("IBLA") decision dated September 5, 2000 and affirmance of Administrative Law Judge ("ALJ") Sweitzer's ruling regarding discovery dated January 9, 1998. The IBLA's decision affirmed ALJ Sweitzer's Order that Plaintiffs' oil shale claims were null and void for failure to perform the required assessment

work and refused to rule on ALJ Sweitzer's decision regarding discovery. Defendants oppose the appeal. The parties' have submitted adequate briefs and have agreed that oral argument is not necessary. For the following reasons, I affirm the IBLA's decision and decline to rule on ALJ Sweitzer's decision regarding discovery. Jurisdiction is proper pursuant to 28 U.S.C. § 1331, 5 U.S.C. § 701.

A. Background

Exxon has 20 unpatented shale oil mining claims and Tosco has 12 such claims located in Garfield County, Colorado, in the Piceance Creek Basin, which is underlain by the Green River Formation. All of these oil shale claims were located prior to February 25, 1920 by Plaintiffs' predecessors in interest. Exxon filed a patent application for its claims in January 1984, Tosco filed a patent application for its claims in June 1985.

Oil shale is defined as "a sedimentary rock containing organic material called kerogen which, upon destructive distillation, produces a substantial amount of oil." *Andrus v. Shell Oil Co.*, 446 U.S. 657, 659 n.3 (1980). Exxon and Tosco, respectively, have spent over a billion dollars and tens of millions of dollars in acquisition, research, development, maintenance, and other expenses relating to oil shale development.

At the time the oil shale claims at issue were located, the 1872 Mining Laws applied. Under the 1872 Mining Laws, a miner who discovered a valuable mineral deposit on Government land received a grant of equitable ownership in the mineral interest directly from Congress. The laws provided that a confirmatory deed or patent from the United States could be obtained upon application to the

Department of the Interior and payment of a nominal sum. Prior to the issuance of a patent, the Act required that a claimant expend $500 worth of labor or improvements on the claim. 30 U.S.C. § 29. Additionally, in order to retain a valid claim, the Act required that "not less than $100 worth of labor shall be performed or improvements made during each year." 30 U.S.C. § 28.

On February 25, 1920, the Mineral Leasing Act was enacted, which removed deposits of oil shale and certain other minerals from the category of minerals that were subject to appropriation under the 1872 Mining Laws. Subsequent to the enactment of the Mineral Leasing Act, oil shale deposits owned by the United States could be acquired only by lease. However, the Mineral Leasing Act contained a "savings clause," which provided that claims located prior to the enactment of the Mineral Leasing Act could be reduced to patent and pass into private ownership, if "thereafter maintained in compliance with the laws under which initiated." 30 U.S.C. § 193.

A hearing regarding Exxon's and Tosco's patent applications was held before ALJ Sweitzer on February 10 and 11, 1997, in Denver, Colorado. ALJ Sweitzer issued an opinion on January 9, 1998 holding that: (a) the contested oil shale claims were invalid for failure to substantially comply with the annual assessment work requirement in 30 U.S.C. § 28; (b) the Department of the Interior was not required to bring the charge of default in assessment work prior to expiration of the publication period; (c) a substantial lack of compliance with the assessment work requirement did and does concern the Government and did and does justify invalidation of an oil shale claim; (d) the resumption doctrine is inapplicable; (e) a claim must be declared invalid if there has been a failure to substantially

comply with the assessment work requirement; (f) the performance of $500 worth of assessment work does not constitute substantial compliance with the assessment work requirements of 30 U.S.C. § 28; (g) BLM has proven by clear and convincing evidence a lack of substantial compliance with the assessment work requirement in the case of both Tosco and Exxon; (h) the doctrines of estoppel and laches do not bar invalidation of the claims for failure to substantially comply with the assessment work requirement; (i) the Plaintiffs' due process rights have not been violated; (j) a discovery of a valuable mineral deposit existed on each claim on the date of withdrawal and on the date of issuance of the final certificate because both the physical finding element and the value element of the test for discovery had been satisfied for each claim; and (k) certain listed subdivisions of the Tosco Hydrocarbon Nos. 79, 82, 83, and 86 claims are nonmineral in character for oil shale because the subdivisions occupy a stratigraphic horizon in which the oil shale beds have been completely eroded away and the claims are therefore void.

Exxon filed a notice of appeal with the Salt Lake City Office of the Office of Hearings and Appeal on February 6, 1998. On February 9, 1998, similar notices were filed by Tosco and the BLM. Tosco and Exxon appealed the portion of ALJ Sweitzer's decision which found that a lack of substantial compliance with statutory assessment work requirements imposed by 30 U.S.C. § 28 rendered their claims null and void. BLM challenged the ALJ's finding that a discovery of a valuable mineral deposit existed on each claim.

On August 31, 2000, the IBLA issued its opinion upholding ALJ Sweitzer's decision that a lack of substantial compliance with statutory assessment work rendered

Exxon's and Tosco's oil shale claims null and void. The IBLA set aside the portion of ALJ Sweitzer's decision which addressed the question of a discovery of a valuable mineral deposit on each of the subject claims because it concluded such a determination was unnecessary.

II. Standard

The Administrative Procedures Act, 5 U.S.C. §§ 701-706 (the APA), is the basis for judicial review of agency decisions. Section 706 of the APA provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

5 U.S.C. § 706; *see, e.g., Biodiversity Legal Foundation v. Babbitt,* 146 F.3d 1249, 1252 (10th Cir. 1998) (administrative decisions are upheld unless they violate § 706(2)(A) or if they are "in excess of statutory . . . authority. 5 U.S.C. § 706(2)(C)"). When applying subsection (2)(A), a court must consider whether the decision is based "on a consideration of all relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971); *Delta Rocky*

Mountain Petroleum, Inc. v. United States Department of Defense, 726 F. Supp. 278, 279 (D. Colo. 1989). "The duty of a court reviewing agency action under the 'arbitrary or capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Olenhouse v. Commodity Credit Corp.,* 42 F.3d 1560, 1574 (10th Cir. 1994). Additionally, the scope of my review is "confined to the agency record or such portions of it which the parties may cite, and additional evidence is not to be admitted." *Roberts v. Morton,* 549 F.2d 158, 160 (10th Cir. 1976).

III. Discussion

Plaintiffs argue that the IBLA's decision that their oil shale claims are null and void for failure to substantially comply with annual assessment work requirements is erroneous. Furthermore, Plaintiffs request that ALJ's Sweitzer's decision that a discovery of a valuable deposit of oil shale existed on each of the contested claims be affirmed.

A. Right to Resume Work

Plaintiffs assert that the statute that created a federal obligation to perform annual assessment work also included the right to resume work which, if exercised before assertion of an adverse challenge, cured a prior lapse in assessment work and preserved an unpatented mining claim. The IBLA concluded that subsequent to the enactment of the Mineral Leasing Act, the resumption doctrine did not apply to oil shale claims where there was a substantial lapse

in the performance of the assessment work. I agree with the IBLA.

Section 5 of the General Mining Law of 1872 describes the assessment work requirement and the resumption doctrine:

> [O]n each claim . . . until a patent has been issued therefore, not less than 100 dollars worth of labor shall be performed or improvements made during each year . . . and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

30 U.S.C. § 28. This section encouraged the development of the mineral deposits in public lands by: (1) requiring that, after locating a claim, a mining claimant perform $100 worth of assessment work for the benefit of each claim each year; and (2) allowing others to obtain possession of public lands covered by mining claims that were not being maintained by the performance of assessment work. Before 1920, the United State's position was that the performance of assessment work was solely a matter between rival or adverse claimants. *See e.g., Nielson v. Champagne Min. & Mill. Co.,* 29 L.D. 491 (1900). This policy was consistent with the state of the law prior to the enactment of the Mineral Leasing Act because the land embraced by a mining claim remained open to the relocation of mining claims. Therefore, the United States would be wasting time and money if it invalidated a mining claim for lack of assessment work when the claimant could

simply relocate the claim within minutes after it had been declared null and void.

However, after 1920, oil shale deposits were no longer subject to location and, therefore, existing claims were protected from relocation by a rival claimant. Hence, subsequent to the Mineral Leasing Act, if oil shale claims were immune from challenge by the United States, "a claim could remain immune from challenge by anyone with or without any assessment work, in complete defiance of the 1872 Act." *Hickel v. Oil Shale Corp.*, 400 U.S. 48, 56 (1970). In *Hickel,* the Court held that oil shale claims were not immune from challenge by the United States for lack of assessment work. The Court noted that the United States has "a keen interest in recapturing those [claims] which had not been 'maintained' within the meaning of § 37 of [the Mineral Lands Leasing] Act." *Id.* at 56-67.

Plaintiffs rely on two post-1920 cases which allowed an oil shale claimant to resume assessment work after a lapse in such work. *See Wilbur v. Krushnic,* 280 U.S. 306 (1930); *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639 (1935). *Krushnic* involved oil shale mining claims located on October 1, 1919. Assessment work was not performed for the 1920 assessment year but was performed for the 1921 assessment year. A patent application was filed on September 25, 1922, and a final receiver's receipt was filed on December 16, 1922. The United States argued that the mining claimants had not maintained their claims because assessment work was not performed for the 1920 assessment year. The Supreme Court disagreed, holding that the claimants had maintained their claims by resuming work after the one-year lapse, and the United States could not take advantage of the one-year lapse unless it challenged

the claims before the claimants resumed assessment work. *Id.* at 317-18.

The oil shale claims in the *Virginia-Colorado* case were located in 1917, and assessment work was performed for the claims each year thereafter until 1931. Assessment work was not performed during the year ending July 1, 1931 and, although the mining claimant had not resumed assessment work before the United States challenged the claims in September of 1931, the claimant had made arrangements for the resumption of assessment work which would have been performed but for the intervention of the United States. The Supreme Court held that the mining claimant was maintaining its claims as required by § 37 of the Mineral Leasing Act. *Id.* at 645-47. Furthermore, in dicta, the *Virginia-Colorado* Court indicated that the failure to perform assessment work gave the government no ground for forfeiture, but inured only to the benefit of an adverse locator. *Id.* at 646.

Plaintiffs argue that the *Krushnic* and *Virginia-Colorado* cases have not been overruled and, therefore, they must be followed by this court. However, although the cases have not been reversed they have been limited to their specific facts. *See Hickel,* 400 U.S. at 57. Moreover, the dicta in *Krushnic* and *Virginia-Colorado* has been specifically rejected by the Supreme Court. The Court in *Hickel* stated: "We disagree with the dicta in [*Krushnic* and *Virginia-Colorado*] that default in doing the assessment work inures only to the benefit of relocators, as we are of the view that § 37 of the 1920 Act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise." *Hickel,* 400 U.S. at 57.

The *Hickel* Court further explained:

> We agree with the Court in *Krushnic* and *Virginia-Colorado* that every default in assessment work does not cause the claim to be lost. Defaults, however, might be the equivalent of abandonment; and we now hold that token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28, is not adequate to "maintain" the claims within the meaning of § 37 of the Leasing Act. To hold otherwise would help defeat the policy that made the United States, as the prospective recipient of royalties, a beneficiary of these oil shale claims. We cannot support *Krushnic* and *Virginia-Colorado* on so broad a ground. Rather, their dicta to the contrary, we conclude that they must be confined to situations where there had been substantial compliance with the assessment work requirements of the 1872 Act, so that the "possessory title" of the claimant, granted by 30 U.S.C. § 26, will not be disturbed on flimsy or insubstantial grounds.

Id. at 57. Accordingly, subsequent to enactment of the Mineral Leasing Act, if there is not substantial compliance with the assessment work requirements, the oil shale claims revert to the United States.

Plaintiffs also argue that the Department of Interior's own rules conclusively recognize the right to resume work. Defendants admit that for many years the Department's regulations provided that performance of assessment work was "solely a matter between rival or adverse claimants to the same mineral land . . . the determination of which is committed exclusively to the courts." *See e.g.*, 43 C.F.R. § 3420.4 (1970); 43 C.F.R. § 185.18 (1949). However, the

existence of that regulation did not deter the *Hickel* Court from concluding that the United States "had, and has, subject matter jurisdiction over contests involving the performance of assessment work [for oil shale claims]." 400 U.S. at 57. Therefore, there is no right to resume work.

B. Requirement of $500 Worth of Work

Next, Plaintiffs argue that completion of the $500 worth of work required for issuance of a patent satisfies the requirement of "substantial compliance" of assessment work. I disagree.

The $500 worth of work required for a patent is a separate requirement from the $100 worth of labor or improvements required on each claim each year. As ALJ Sweitzer correctly noted:

> [a]lthough sections 28[, the $100 annual assessment work requirement] and 29[, the $500 worth of work prior to issuance of a patent requirement] both require the expenditure of labor or the making of improvements on a mining claim, they serve two distinct purposes and have distinct minimum standards. The purposes of the section 28 requirement of $100 in annual work are to assure that a claimant undertakes a diligent good faith effort to develop the mining claim, and to prevent the location of mining claims for speculative purposes. *Herr,* 101 Interior Dec. at 117-18 (citing *Chambers v. Harrington,* 111 U.S. 350, 353 (1884)). On the other hand, section 29 requires, without time limitations, the expenditure by a mining claim patent applicant of at least $500 for labor or improvements on a

> mining claim before it can be patented. The reason for this requirement is that Congress believed that the expenditure of that amount of money, whether in 1 year or 5 years, would demonstrate a claim's value as a mine. 2 AM. L. OF MINING § 51.05[1] (2d ed. 1984).

ALJ Sweitzer's Decision at 40. Consequently, Plaintiffs' completion of $500 worth of work alone does not satisfy the requirement of substantial compliance of assessment work.

C. Substantial Lapse in Assessment Work

Plaintiffs contend that Defendants failed to prove lack of "substantial compliance" with annual assessment work requirements. Defendants argue that the IBLA's holding that there was a substantial lapse in assessment work was based on substantial evidence in the record. I agree with Defendants.

Courts have fashioned general principles to be applied when determining whether work satisfies the assessment work requirement. Those principles are: (1) the work must be performed in good faith; (2) the work must tend to develop the claim; and (3) the work must tend to directly facilitate the extraction of minerals from the claim. *See ALJ Sweitzer Decision* at 41 (citing 2 AM. L. OF MINING § 45.04[5][a]).

The IBLA stated that its "review of the evidence considered by ALJ Sweitzer convince[d] [it] that he was correct in concluding that [Plaintiffs] did not [substantially comply with the annual assessment work] requirement with respect to any of . . . their claims in issue." 153

IBLA 213. ALJ Sweitzer found the following with respect to assessment work:

> [As to the TOSCO claims,] assessment work was required but not performed for the assessment years ending in 1929 through 1931, 1933 through 1957, and 1960 through 1974, with the exception that no assessment work was required for the year ending in 1935 for the Hydrocarbon Nos. 76, 77, 78, 81, 84, and 87 claims, as a notice of intent to hold those claims was filed for that year. Consequently, substantial compliance with the assessment work requirement was not achieved for any of the Tosco claims.

and:

> [As to the Exxon claims,] [w]ith regard to the . . . years ending in 1920 through 1972, the evidence does clearly and convincingly show that no assessment work was performed. Like Tosco, Exxon has submitted no evidence of work to counter the findings of the Departmental examiners that no assessment work was performed for more than 45 years, but rather, relies upon the . . . argument that a field examination cannot clearly and convincingly show a lack of assessment work in prior years.
>
> While erosion, revegetation, and vegetation density are factors affecting a field examiner's ability to locate assessment work, the Departmental examiners were thorough in their examinations and have shown that small excavations dating back to 1920's (the pits on the Tosco claims and those nearby but outside the Exxon claim group) can be

> located with a high degree of success. Moreover, the finding of no assessment work for the years ending in 1920 through at least 1928 is supported by a contemporary examination of the claims performed in 1928.
>
> . . .
>
> For the years ending in 1973 through 1988, Exxon filed affidavits stating that assessment work worth at least $2,000 or $100 per claim was performed for each year. However, for the year ending in 1974, Exxon claims only $500 worth of work in the form of the installation of culverts and the grading of 15 miles of road. All of the work was road maintenance to allow access to the claims and there is no dispute this work was performed.
>
> However, [Defendants are] correct that this work does not qualify as assessment work. There is not one shred of evidence that the purpose of the road maintenance was to facilitate development of the claims. Unlike the nearby oil and gas road, the poor roads leading to and traversing the claims were not improved to allow passage of heavy equipment necessary for drilling or other development activity, but rather, they were merely maintained. The roads do not lead to any excavations or other mining activity performed or planned subsequent to 1973 because there have been none.

ALJ Sweitzer's Decision at 47-50.

These findings were based on the following evidence, some of which ALJ Sweitzer accepted and some of which he rejected.

1. Tosco Claims

For the Tosco claims, issuance of the first half of the final certificate occurred on July 27, 1988. Consequently, the annual assessment work requirement applied through the assessment year ending September 1, 1987, with the exception of the year ending July 1, 1932, as the assessment work requirement was suspended for that year, and the year ending July 1, 1935, for the Hydrocarbon Nos. 76, 77, 78, 81, 84, and 87 claims, as a notice of intent to hold those claims was filed for that year.

The Tosco claims were first examined in the summer of 1928 by Warren Sholes, a mining engineer of the General Land Office (GLO). With regard to assessment work, he found numerous cuts and pits and evidence of road and trail work along Brush Creek Canyon. His examination included review of the affidavits that at least $100 worth of assessment work which were filed each year for each of the Tosco claims for the assessment year ending December 31, 1919, through the assessment year ending July 1, 1928. He also interviewed various persons who performed the work. Based on his examination, Mr. Sholes concluded that less than $100 of assessment work was performed on each claim for at least three years and on all but one of the claims for six years.

ALJ Sweitzer rejected the conclusion of Mr. Sholes. Instead, ALJ Sweitzer concluded that there was not clear and convincing evidence that the required assessment work had not been performed for each of the Tosco claims

for the year ending December 31, 1920 through the year ending July 1, 1928. *See ALJ Sweitzer's Decision* at 43.

The claims were examined again in the summer of 1931 by GLO examiners O'Keefe and Cutter. No new work was evident on the claims, indicating that no work had been performed for the assessment years ending July 1, 1929, July 1, 1930, and July 1, 1931.

During the summer of 1986, the Tosco claims and associated records were examined by Edward Ginouves, a BLM mining engineer and mineral examiner, and Rodney Herrick, a BLM geologist. With regard to assessment work, the BLM examiners used a map prepared by Mr. Sholes to locate 22 of the 29 old pits identified on the map. In 1995, Mr. Ginouves completed a mineral report detailing their findings, which included a finding that with the exception of the core hole drilling in 1958 and/or 1959, evidence of assessment work for the period of 1929 through 1974 was not found by the examiners either in the records or on the claims.

A review of assessment work filings revealed that no assessment work affidavits were filed for the assessment year ending July 1, 1929 through the assessment year ending July 1, 1974. Additionally, Mr. Stidd, who was the record title holder of the claims from 1924 to 1974 allowed the claims to be sold for $169.02 in delinquent taxes in 1974.

Based on his discriminating review of the evidence, ALJ Sweitzer concluded that there was clear and convincing evidence that the assessment work requirement was not satisfied for the years ending in 1929 through 1957 and the assessment years ending in 1960 through 1974.

ALJ Sweitzer rejected Tosco's arguments that the construction and maintenance of unpaved roads, excavation of shallow, small surface pits, and stratigraphic sampling are common forms of assessment work which are subject to obscuration if not obliteration by natural processes of erosion and revegetation.

ALJ Sweitzer noted that:

> [w]hile it is a distinct possibility that maintenance work on the poor dirt roads and trails would not be detectable in distant future years, such work, under the circumstances, likely was not performed and would not be qualifying in nature. Those circumstances include the absence of any evidence of excavations, drill holes, or other mining activity for the assessment years ending in 1929 through 1957 and the assessment years ending in 1960 through 1974, the lack of economic incentive to develop the claims, and the fact that most of the trails and roads are likely associated with improvements and activities related to grazing rather than mining. For these periods, there is no evidence of mining activity, and little evidence of the likelihood thereof, which might necessitate road maintenance to allow access.

ALJ Order at 45.

Based on my review of the evidence, I conclude that the IBLA's determination that Tosco failed to substantially comply with the annual assessment work requirement was not arbitrary and capricious and was not otherwise contrary to law.

2. Exxon Claims

ALJ Sweitzer continued his discriminate analysis of the evidence concerning the Exxon claims. For the Exxon claims, issuance of the first half of the final certificate occurred on June 15, 1989. Consequently, the annual assessment work requirement applied through the year ending September 1, 1988, with the exception of the year ending July 1, 1932, as the assessment work requirement was suspended for that year. Defendants concede that the assessment work requirement was met for each of the Exxon claims for the years ending 1957, 1958, 1964, and 1966.

The Exxon claims were first examined by the Department in 1928 by GLO mining engineer Louis Mackel. Based on Mr. Mackel's examination, he concluded that no assessment work had been performed from the time the claims were located in 1919.

Another examination of the Exxon claims and associated records was conducted in the summer of 1984 by BLM mineral examiners Rodney Herrick, Roy Drew, and Edward Ginouves. BLM geologist John Morrone further investigated the claims in September of 1993 and 1995 and with BLM mining engineer, Paul Daggett, in October of 1993. His investigation included examination of aerial photographs of the claim group area taken in 1954, 1962, 1966, 1967, 1973, 1979, 1980, and 1981. Their investigation revealed numerous bulldozer cuts created after the 1967 aerial photos and prior to the 1973 aerial photos. Mr. Morrone concluded that the bulldozer cuts did not satisfy the assessment work requirement because they did not show any valuable mineralization and only served to

better expose that which was already naturally exposed. No other evidence of assessment work was discovered.

ALJ Sweitzer concluded that Defendants had not met their burden of clearly and convincingly establishing that the bulldozer cuts did not qualify as assessment work. Therefore, he found that each cut – one on each of the Princess Anne No. 4, Atlantic Nos. 1, 3, 5, 7, and 8, and Washington Nos. 5, 6, 7, and 8 claims and two on the Atlantic No. 6 claim – satisfied the assessment work requirement for one year for the claim upon which it was located.

For the years ending in 1973 through 1988, Exxon filed affidavits stating that assessment work worth at least $100 per claim was performed for each year. However, for the year ending in 1974, Exxon claimed only $500 worth of work (for all 20 of its claims) in the form of the installation of culverts and the grading of 15 miles of road. There is no dispute that this work was performed. However, ALJ Sweitzer concluded that such road work was road maintenance not intended to develop the claim or directly facilitate the extraction of minerals from the claim. Therefore, he concluded the road work did not qualify as assessment work.

Based on this evidence, the IBLA did not act arbitrarily or capriciously in concluding that Exxon failed to substantially comply with the assessment work requirement for each of its claims.

D Discovery

Plaintiffs seek affirmance of ALJ Sweitzer's ruling on discovery. ALJ Sweitzer held that a discovery of a valuable

mineral deposit existed on each claim on the date of withdrawal and on the date of issuance of the final certificate because both the physical finding element and the value element of the discovery test had been satisfied for each claim. *See ALJ Sweitzer's Decision* at 57-74. The IBLA concluded that because the claims were void for failure to perform annual assessment work, there was no need to rule on the discovery issue. I agree with the IBLA.

I have affirmed the IBLA's decision regarding assessment work and, therefore, Plaintiffs' claims are void. Hence, there is no need to rule on the discovery issue.

I merely note that if a decision on discovery were required, that decision would fall to the IBLA on remand.

E. Doctrines of Estoppel and Laches

Plaintiffs contend that they followed the guidance of certain federal employees or offices and, therefore, the United States is estopped from making any argument contrary to that guidance. Defendants argue that case law establishes that estoppel does not lie against them. I agree with Defendants.

The Supreme Court has held that erroneous advice of government officials does not normally give rise to a claim of estoppel. *Office of Personnel Management v. Richmond,* 496 U.S. 414, 415-16 (1990) (holding that erroneous and written advice given by a Government employee to a benefits claimant ordinarily does not give rise to estoppel against the Government). The Court noted that equitable estoppel does not lie against the government as it would against private litigants. *Id.* at 419. "Not even the temptations of a hard case" provide a basis of relief. *Id.* at 420.

The Court did not hold that estoppel may never be found against the government, but the only possible exception which it discussed involved affirmative misconduct on the part of a government employee. *Id.* at 421-22. Plaintiffs do not allege affirmative misconduct on the part of a government employee. Therefore, based on Supreme Court precedent, Plaintiffs' estoppel claim is rejected.

F. Due Process Rights

Plaintiffs assert that it would violate the Constitution's due process clause to accept Defendants' contentions respecting annual assessment work defaults.

According to Plaintiffs, there was not sufficient notice and an opportunity to defend against Defendants' argument, accepted by ALJ Sweitzer, that the road work performed by them did not qualify as assessment work. Apparently, Plaintiffs complain that they were not prepared to adequately present their case regarding the annual assessment work requirement. However, as pointed out by ALJ Sweitzer, Plaintiffs received written testimony and exhibits, including the testimony and reports of the BLM examiners of the claims, many months before the initial hearing. Additionally, at the hearing, Plaintiffs presented evidence and prehearing statements relating to the adequacy of assessment work. Therefore, I conclude that Plaintiffs had sufficient opportunities to present their cases regarding annual assessment work.

Next, Plaintiffs argue that due process requires notice and an opportunity to be heard in any rulemaking respecting a change in the law such as that now asserted by Defendants. Plaintiffs maintain that there was a change of law because the law was well established up until 1970

(when the *Hickel* case was decided) that assessment work was of no concern to the Department of Interior and that any assessment work default challenge could be brought only during a period of default.

On September 1, 1972, the Department amended its regulations to reflect the *Hickel* holding that substantial compliance with the annual assessment work requirement was a matter of concern to the Department. *See* 43 C.F.R. §§ 3851.3, 3851.4 (1973). Prior thereto, Departmental regulations reflected the dicta in *Virginia-Colorado* that compliance with the annual assessment work requirement was solely a matter between rival or adverse claimants and was no concern to the Department. *See* 43 C.F.R. § 185.18 (1949); 43 C.F.R. § 3420.4 (1970).

On July 15, 1971, before the change of the regulations, there was a published notice and text of the proposed amendment, along with an invitation for public comments, suggestions, or objections. *See* 36 Fed. Reg. 13153 (July 15, 1971) (stating that the purpose of the proposed amendment was to make the regulation consistent with the principles set out in *Hickel*); *see also* 37 Fed. Reg. 17836 (September 1, 1972) (discussing previous notice and comments received and ultimately adopting the proposed amendment without change). This notice provided adequate notice to Plaintiffs as well as an opportunity to be heard. Therefore, Plaintiffs' due process claim fails.

Furthermore, for the additional reason that Plaintiffs did not perform adequate assessment work after the 1970 decision of *Hickel,* their due process claim fails. After the 1970 decision in *Hickel,* the state of the law was clear: the United States was the beneficiary of all oil shale claims which were invalid for lack of assessment work. Even after

this decision, the evidence demonstrates that Tosco did not comply with the assessment work requirement from 1970 to 1974 and Exxon failed to comply with the requirement in 1970, 1971, 1972, and 1974. Such failures show that Plaintiffs did not substantially comply with the assessment requirement even after they had notice that substantial compliance was required in order to retain a valid claim. For this alternative reason, their due process claim fails.

G. Equal Protection

Finally, Plaintiffs contend that their equal protection rights were violated because there is no compelling reason to treat them differently from the 2,863 similar claims that have already gone to patent. Defendants point out that Plaintiffs do not identify themselves as belonging to a protected class under the Constitution, nor could they.

Plaintiffs do not allege that a fundamental right is at stake, nor do they allege that they are members of a suspect class. However, a plaintiff may bring a claim based on a "class of one." Under such a theory, in order to prevail on an equal protection claim, Plaintiffs must show that Defendants treated them differently than others "similarly situated . . . and that this different treatment lacked a rational basis." *Landmark Land Co. of Oklahoma v. Buchanan,* 874 F.2d 717, 722 (10th Cir. 1989); *see also City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439-40 (1985). Here, Defendants are refusing to patent Plaintiffs' oil shale claims because Plaintiffs failed to comply with the annual assessment work requirement. As discussed above, the purpose of the assessment work requirement is to encourage the development of the mineral deposits in

public lands and ensure that they are not used for speculative purposes. Enforcing this requirement serves a rational basis. Therefore, Plaintiffs' equal protection claim is rejected.

I hold that the IBLA's decision is grounded upon a sound consideration of all relevant factors, is not arbitrary and capricious and is not otherwise contrary to law.

Accordingly, it is **HEREBY ORDERED THAT**:

(1) The IBLA's decision is **AFFIRMED**.

Dated: May 28, 2002 in Denver, Colorado.

BY THE COURT:

/s/ Lewis T. Babcock
LEWIS T. BABCOCK,
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No. 00-B-2524 (PAC) (Consolidated with 00-B-2536)

The undersigned certifies that a copy of the foregoing Memorandum Opinion and Order was served on May 29, 2001, by:

(X) delivery to:

Peter Krumholz
Michael Hegarty
Assistant U. S. Attorneys

James A. Clark, Esq.
Baker and Hostetler
D.C. Box No. 17

(X) depositing the same in the United States Mail, postage prepaid, addressed to:

Donald L. Morgan, Esq.
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Ave., N.W.
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Washington, D.C. 20006-1801

/s/ Geneva D. Matter
Deputy Clerk

[SEAL]
IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

UNITED STATES

v.

TOSCO CORPORATION, EXXON CORPORATION

IBLA 98-164, 98-165 Decided August 31, 2000

Appeals from a consolidated decision by Administrative Law Judge Harvey C. Sweitzer, declaring unpatented oil shale placer mining claims null and void. Colorado Contests No. 757, 758.

Affirmed in part; set aside in part.

1. Mining claims: Assessment Work

   30 U.S.C. § 28 (1994) calls for the expenditure of $100 in assessment work on or for the benefit of a mining claim each year until patent. Before patent can be obtained the claimant must have made improvements valued at $500 or more (30 U.S.C. § 29 (1994)), but the expenditure of $500 does not terminate the ongoing requirement in 30 U.S.C. § 28 (1994), for expenditure of $100 each assessment year.

2. Mining Claims: Assessment Work – Mining Claims: Determination of Validity

The United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1994), and the Department has jurisdiction to challenge the validity of a mining claim for failure to substantially comply with the assessment work requirement.

3. Mining Claims: Assessment Work – Mining Claims: Determination of Validity

Where a mining claimant resumes performance of assessment work after a period of nonperformance of assessment work, he generally may revive the claim. However, where a third party right attaches during the period of inactivity, the claimant is precluded from regaining his claim by resuming work. In the case of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1994), the United States is the intervening third party and the resumption doctrine does not apply to oil shale claims.

APPEARANCES: Donald L. Morgan, Esq., Washington, D.C., for Contestee Tosco Corporation; James A. Baker, Esq., Denver, Colorado, for Contestee Exxon Corporation; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for Contestant Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Tosco Corporation and Exxon Corporation (Contestees) have appealed from a January 9, 1998, consolidated decision (ALJ decision) by Administrative Law

Judge (ALJ or Judge) Harvey Sweitzer declaring the Hydrocarbons Nos. 76 through 87, inclusive, as amended, unpatented oil shale placer mining claims, situated in secs. 7, 17, and 18, T. 5 S., R. 99 W., Sixth Principal Meridian, and in secs. 11, 12, 13, and 14, T. 5 S., R. 100 W., Sixth Principal Meridian, Garfield County, Colorado (Contest No. 757), and the Atlantic Nos. 1 through 8, Princess Anne Nos. 1 through 4, inclusive, and Washington Nos. 1 through 8, inclusive, unpatented oil shale placer mining claims, situated in secs. 21, 28, 29, 30, and 31, T. 4 S., R. 97 W., Sixth Principal Meridian, Garfield County, Colorado (Contest No. 758), null and void for failure to substantially comply with annual assessment work requirements at 30 U.S.C. § 28 (1944).[1]

The Bureau of Land Management (BLM or Contestant) has appealed from that part of the January 9, 1998, decision which holds that a discovery of a valuable deposit of oil shale existed on each of the contested claims on February 20, 1920, and on the date the Contestees were issued final certificates for the claims by BLM. (Contestant's Statement of Reasons (BLM SOR) at 1; *see* ALJ decision at 57-74.)

The 12 Tosco claims in Contest No. 757 (Hydrocarbon Nos. 76 through 87), embracing approximately 1,912 acres, were located on December 6, 1917. (Ex. G-757-39, at 5; Contestant's SOR at 7.) Tosco acquired the claims on April 23, 1979, for the purchase price of $9,562.10 ($5 per acre

[1] Not at issue in these appeals is the nonmineral character of certain portions of the Tosco claims in Contest No. 757, and Judge Sweitzer's ruling that those portions of the claims are invalid and not eligible for patent. *See* ALJ decision at 74-75.

for 1,912.42 acres). (Exs. G-757-12, Table 3; C-213.) Tosco filed a patent application for the claims on June 11, 1985, and by July 27, 1988, when the First Half-Mineral Entry Final Certificate was issued, Tosco had paid all applicable fees and the purchase price for issuance of the patent. (Exs. G-758-16; G-758-52; G-758-12.)

The 20 Exxon claims involved in Contest No. 758 (Atlantic Nos. 1 through 8, Washington Nos. 1 through 8, and the Princess Anne Nos. 1 through 4), including approximately 3,203 acres, were located on December 1, 1919. (Ex C-1, Stip. 2.) Exxon purchased the 20 claims at issue here and 52 other claims on February 2, 1966, for the sum of $100. (exs. G-758-70; C-1, Stip. 3.) In January 1984, Exxon filed a patent application for the 20 claims. (Ex. C-1, Stip. 4.) Exxon paid all applicable fees including the purchase price for issuance of a patent on January 23, 1984. (Ex. C-1, Stip. 19.)

The contest was initiated when BLM, on May 3, 1995, in the case of Exxon, and on May 25, 1995, in the case of Tosco, filed separate complaints charging lack of discovery, within the limits of each claim, of an oil shale deposit sufficient to support a valid location on or before February 25, 1920, the lack of a present discovery of a valuable deposit on each claim, and the failure of the claimants and their predecessors in interest to comply with 30 U.S.C. § 28 (1994), by failing to substantially comply with the annual assessment work requirement. The two complaints were consolidated for hearing.

A hearing was held before Judge Harvey Sweitzer on February 10 and 11, 1997, in Denver, Colorado.

In his January 9, 1998, decision, Judge Sweitzer found (a) that the contested claims were invalid for failure

to substantially comply with the annual assessment work requirement in 30 U.S.C. § 28 (1994) (ALJ decision at 18-25); (b) that the Department of the Interior was not required to bring the charge of default in assessment work prior to expiration of the publication period (ALJ decision at 25-32); (c) that a substantial lack of compliance with the assessment work requirement did and does concern the Government and did and does justify invalidation of an oil shale claim (ALJ decision at 32-34); (d) that the resumption doctrine is inapplicable (ALJ decision at 34-39); (e) that a claim must be declared invalid if there has been a failure to substantially comply with the assessment work requirement (ALJ decision at 39); (f) that the performance of $500 worth of assessment work does not constitute substantial compliance with the assessment work requirements of 30 U.S.C. § 28 (ALJ decision at 40-41); (g) that Contestant BLM has proven by clear and convincing evidence a lack of substantial compliance with the assessment work requirement in the case of both Tosco and Exxon (ALJ decision at 41-50); (h) that the doctrines of estoppel and laches do not bar invalidation of the claims for failure to substantially comply with the assessment work requirement (ALJ decision at 50-54); (i) that the Contestees' due process rights have not been violated (ALJ decision at 55-57); (j) that a discovery of a valuable mineral deposit existed on each claim on the date of withdrawal and on the date of issuance of the final certificate because both the physical finding element and the value element of the test for discovery had been satisfied for each claim (ALJ decision at 57-74); and (k) that certain listed subdivisions of the Tosco Hydrocarbon Nos. 79, 82, 83, and 86 claims are nonmineral in character for oil shale because the subdivisions occupy a stratigraphic horizon in which the oil shale beds have been completely eroded

away and the claims are therefore void. (ALJ decision at 74-75.)

On February 6, 1998, Contestee Exxon filed a notice of appeal with the Salt Lake City Office of the Office of Hearings and Appeals, and this was followed on February 9, 1998, by similar notices filed by Contestee Tosco and Contestant BLM.

Both Tosco and Exxon challenge that part of Judge Sweitzer's decision which found lack of substantial compliance with statutory assessment work requirements imposed by 30 U.S.C. § 28. BLM challenged the ALJ finding that a discovery of a valuable mineral deposit existed on each claim.

In his decision, Judge Sweitzer found from the evidence that the required affidavits of assessment work were not filed and the required assessment work was not performed on the Tosco claims for a significant period between location in 1919 and the date of patent application. He specifically found that

> qualifying assessment work of at least $100 was performed for each of the Tosco claims for the assessment years ending in 1919 through 1928, 1958, 1959, and 1975 through 1987. Also, no assessment work was required for the year ending in 1932, as the assessment work requirement was suspended for that year. Finally assessment work was required but not performed for the assessment years ending in 1929 through 1931, 1933 through 1957, and 1960 through 1974, with the exception that no assessment work was required for the year ending in 1935 for the Hydrocarbon Nos. 76, 77, 78, 81, 84, and 87 claims, as a notice of intent to hold those claims was filed for

> that year. Consequently, substantial compliance with the assessment work requirement was not achieved for any of the Tosco claims.

(ALJ decision at 47.) He similarly determined a lack of substantial compliance with the assessment work requirement on the part of Exxon:

> With regard to the remaining years ending in 1920 through 1972, the evidence does clearly and convincingly show that no assessment work was performed. Like Tosco, Exxon has submitted no evidence of work to counter the findings of the Departmental examiners that no assessment work was performed for more than 45 years, but rather, relies upon the aforementioned argument that a field examination cannot clearly and convincingly show a lack of assessment work in prior years.
>
> While erosion, revegetation, and vegetation density are factors affecting a field examiner's ability to locate assessment work, the Departmental examiners were thorough in their examinations and have shown that small excavations dating back to 1920's (the pits on the Tosco claims and those nearby but outside the Exxon claim group) can be located with a high degree of success. Moreover, the finding of no assessment work for the years ending in 1920 through at least 1928 is supported by a contemporary examination of the claims performed in 1928.
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> * * *
>
> For the years ending in 1973 through 1988, Exxon filed affidavits stating that assessment work worth at least $2,000 or $100 per claim was performed for each year. However, for the year ending in 1974, Exxon claims only $500 worth of

work in the form of the installation of culverts and the grading of 15 miles of road. All of the work was road maintenance to allow access to the claims and there is no dispute this work was performed.

However, Contestant is correct that this work does not qualify as assessment work. There is not one shred of evidence that the purpose of the road maintenance was to facilitate development of the claims. Unlike the nearby oil and gas road, the poor roads leading to and traversing the claims were not improved to allow passage of heavy equipment necessary for drilling or other development activity, but rather, they were merely maintained. The roads do not lead to any excavations or other mining activity performed or planned subsequent to 1973 because there have been none. * * *

* * *

Contestees' argument is rejected as contrary to established law, as set forth in published decisions of the Department and the courts dating back to the turn of the century. As previously noted, road work qualifies as assessment work if it is performed for the purpose of assisting in the development of the claims, such as transporting machinery and materials. [*United States v.*] *El Portal Mining Co.,* 55 Interior Dec. [348] at 351 [1935]; *see also* [*United States v.*] *9,947.71 Acres of Land, Etc.,* 220 F.Supp [328] at 332 [1963]; *Emily Lode,* 6 Pub. Lands Dec. [220] at 222 [1887]; *Tacoma and Roche Harbor Lime Co.,* 43 Pub. Lands Dec. [128] at 134-35 [1914]. Roads should be associated with actual excavations so as to clearly show that they are intended for use

> in connection with the claims under consideration. 2 *Lindley on Mines* § 629 p. 1542. The assessment work requirement is not satisfied by work done merely to comply with the assessment work requirement and to hold the property without any intent to make use of the work product within a reasonable period of time for the purpose of mining the claim. *See Hough v. Hunt*, 70 P. 1059, 1060 (1902); *Kinsley v. New Vulture Mining Co.*, 90 P. 438, 439 (1907). *See also* [*United States v.*] *Ruddick*, 52 Pub. Lands Dec. [313] at 324 [1927] (bridge and road work expenditures, after operations had been abandoned and equipment removed, and with no evidence of a contemplated resumption of drilling operations, cannot be accepted as qualifying acceptance work).

(ALJ decision at 48-50.)

Judge Sweitzer relied on *United States v. Herr*, 130 IBLA 349, 357, 101 I.D. 113, 117 (1994), in rejecting Contestees' claim that even though a claimant performed no assessment work for a time, the claim may be revived by the claimant's resumption of assessment work regardless of intervening rights which attached during the period when no assessment work was performed. (ALJ decision at 34-39.)

In addressing the relationship between 30 U.S.C. § 28 and 30 U.S.C. § 29, Judge Sweitzer again cited *Herr, supra* at 357, in holding that compliance with the one-time $500 requirement (30 U.S.C. § 29 (1994)) for patent application did not constitute "substantial compliance" with the annual assessment work requirement of 30 U.S.C. § 28. (ALJ decision at 40.)

In their joint statement of reasons (Tosco SOR), Contestees challenge Judge Sweitzer's conclusion that lack of performance of assessment work rendered the claims null and void. Contestees argue that:

> Judge Sweitzer's conclusion conflicts with well-settled Department and judicial law that, while a protest can be brought by anyone, a private challenge of assessment work default can be brought only by a rival claimant, i.e., someone who claims the same land as a relocator. A protester has no standing to complain of nonperformance of assessment work; only a rival mining claimant can do that. Even then, the claimant must bring his challenge promptly in a court suit, to be filed within 30 days of the filing during the publication period of a notice of adverse claim. The Department lacks jurisdiction to adjudicate an assessment work dispute between private parties. Only the courts can. *E.g.,* 30 U.S.C. § 29; authorities cited above at pages 13-14.

(Tosco SOR at 28.)

In response to Judge Sweitzer's determination that certain of the road work completed on the claims could not be accorded recognition as valid assessment work, Contestees contend that the Department has taken a different view in the past. Citing the December 10, 1920, "General Report, Oil Shale Situation, Western Colorado," Contestees claim that:

> Mineral Examiners Oral J. Berry and G. L. Duer and Special Agent J. E. Connolly reported to the Commissioner that trails were necessary for access to claims and for removal of ore "and in many instances, numerous trails are necessary for the working of single groups of claims," that it

> was necessary to maintain work crews on the ground "and cabins must be maintained for this purpose[ ] and quarters for the men maintained while they are at work["] and that "much of the work * * * consists of open cuts, shallow trenches on the face of the escarpments and the sinking of pits into the oil shale deposits from the surface." * * * They continued
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> * * *
>
> All of this work has been earnestly undertaken by those who are really interested in the development of the shales, those exposures have been made for a useful purpose, and . . . should be considered legitimate development work for patent purposes. [*Citing* Ex. C-231 at 5-7.]

(Tosco SOR at 32 (footnote omitted).)

In their SOR, Contestees further argue the importance of two cases, *Wilbur v. Krushnic*, 280 U.S. 306 (1930), and *Ickes v. Virginia-Colorado Development Co.*, 295 U.S. 639 (1935), for the proposition the Government should not be able to take away an oil shale claimant's rights for lack of assessment work, and that the claim owner was entitled to resume assessment work at any time. (Tosco SOR at 16-22.)

Third, Contestees herein, with regard to the assessment work issues, contend that from the date of location of the claims in contest until at least 1991,

> the Department maintained a rule that resumption of work cured a prior default so that a challenge for a default could be made only during a default. This rule has a clear statutory basis and has been consistently recognized by the courts.

> Again, no compelling reason has been given for retroactive departure from this rule. Any past default on the claims in contest had been cured in the years preceding the filing of patent applications and the issuance of final certificates, which terminated any further obligation to perform assessment work, and did so prior to 1991.

(Tosco SOR at 4.)

In its statement of reasons for appeal (BLM SOR) of the January 9, 1998, decision, Contestant BLM challenges Judge Sweitzer's determination that all prospectively valuable deposits of oil shale, in sufficient quantity, meet the value element of the test for discovery under the 1872 Mining Law. (BLM SOR at 2.) BLM also challenges the ALJ's determination that the physical finding element of the test of discovery has been satisfied for each of the contested claims. (BLM SOR at 38.)

In his decision, Judge Sweitzer had held that a thin, lean exposure in the Green River Formation is generally deemed sufficient for a discovery, even if the richer "valuable" strata are not exposed on a claim, because the presence of these strata at depth is generally known or reasonably certain. (ALJ decision at 69.) The ALJ made the following specific determination:

> All of the claims contain exposures of at least lean oil shale in the Green River Formation under conditions, both on the date of withdrawal and on the date of issuance of the first half of the final certificate, where the existence of the richer "valuable" strata of the Parachute Creek Member at depth was either known through exposures of those strata or reasonably certain through geologic inference; therefore, the physical finding

> element of the discovery test has been satisfied for each claim.

(ALJ decision at 69.)

The critical issues in this appeal are whether the failure to perform assessment work renders these claims void, and whether a discovery of a valuable mineral deposit on each of the contested claims existed both on the date of discovery and on the date of issuance of the First Half of the Final Certificate. We hold that Judge Sweitzer's affirmative finding on the assessment issue is supported both in law and fact. We determine that we need not reach the issue of discovery and we do not do so.

In addressing the assessment issues, we are guided by our rulings in *United States v. Cliffs Synfuel Corp. (Cliffs Synfuel)*, 146 IBLA 353 (1998), *Jerry D. Grover d.b.a. Kingston Rust Development*, 139 IBLA 178 (1997), and *United States v. Herr, supra.*

[1] The governing statute in Contestees' appeal, 30 U.S.C. § 28 (1994), calls for assessment work of a value of $100 for the benefit of each mining claim each year until patent. Before patent can be obtained, a claimant must have made improvements valued at $500 or more. 30 U.S.C. § 29 (1994). The expenditure of $500, however, does not terminate the ongoing requirement for expenditure of $100 each assessment year specified in 30 U.S.C. § 28 (1994). *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 658 n.1 (1980). In *Cliffs Synfuel, supra* at 359, we quoted from our decision in *United States v. Energy Resources Technology Land, Inc. (Energy Resources)*, 74 IBLA 117 (1983), *rev'd sub nom. Savage v. Hodel*, Civ. No. 83-1838 (D. Colo., Nov. 19, 1983), *vacated as moot, TOSCO Corp. v. Hodel*, 826 F.2d 948 (10th Cir. 1987), where we observed that the

requirements of 30 U.S.C. § 29 (1994) (performance of $500 worth of assessment work as a prerequisite to the issuance of patent) and 30 U.S.C. § 28 (1994) (yearly performance of $100 worth of assessment work) are only indirectly related. We stated in *Energy Resources*:

> [W]hile it is true that the requirement of section 29 can be satisfied by the performance of annual labor pursuant to section 28, the reverse is not possible. If it were, a claimant could do $500 worth of improvement on his claim during the first year of location – before the obligation to perform assessment work had even accrued – and then hold the unpatented claim for the next 50 years without ever performing any of the annual assessment work required by section 28. Clearly the 1872 Act did not contemplate that once a claimant had accomplished $500 worth of work he would thereafter be excused from any further work.

Id. at 122.

The Federal courts and this Board have held on numerous occasions that while a claimant may have made improvements valued at $500 in order to obtain patent, such expenditure does not terminate the ongoing requirement for expenditure of $100 each assessment year in 30 U.S.C. § 28 (1994). *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 658 n.1 (1980); *Hickel v. The Oil Shale Corp.*, 400 U.S. 48, 54-55 (1970); *Cliffs Synfuel, supra* at 359; *Jerry D. Grover d.b.a. Kingston Rust Development, supra* at 181-82. Our review of the evidence considered by Judge Sweitzer convinces us that he was correct in concluding that Contestees did not meet this requirement with respect to any of the [sic] their claims in issue.

[2, 3] As we noted in *Cliffs Synfuel, supra* at 359, oil shale deposits on lands in Federal ownership were withdrawn from location under the 1872 Mining Law by section 37 of the Mineral Leasing Act of 1920, which made oil shale deposits subject to Federal leasing. 30 U.S.C. §§ 193, 241(a) (1994). Excepted from this provision were valid mining claims located before February 25, 1920, "thereafter maintained in compliance with the laws under which initiated." 30 U.S.C. § 193 (1994).

We stated in *Cliffs Synfuel, supra* at 360, that *Wilbur v. Krushnic* and *Ickes v. Virginia-Colorado Development Corp., supra*, are not controlling in this context. We explained that the "resumption doctrine" articulated in *Krushnic* (holding that if a claimant does not do the necessary annual labor for a period of time, but resumes before another party's rights attach, nothing is lost by allowing the claimant to revive the claim with his labor, rather than formally relocating the claim) does not apply in the case of oil shale claims where a default has occurred after the claims became subject to section 37 of the 1920 Leasing Act. As we noted in *Cliffs Synfuel, supra* at 360, during the period that the claim is abandoned and the land is subject to appropriation, Federal rights attach, and the intervention of those rights deprives the claimant of the ability to reactivate the claim by resumption of work. The attachment of valid rights during a period of nonperformance of assessment work was recognized when the Supreme Court found in *Hickel v. Oil Shale Corp., supra* at 57, that the United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1994). The *Hickel* Court specifically held that "every default in assessment work does not cause the claim to be lost,"

however, "token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28 is not adequate to 'maintain' the claims within the meaning of § 37 of the Leasing Act." *Id.* at 57.

We explained in *Cliffs Synfuel, supra* at 360, that section 37 of the 1920 Leasing Act effectively amended the 1872 Mining Law by making oil shale a leasable, rather than a locatable, mineral. Although for a period following passage of the 1920 legislation, the courts and the Department stated that a failure to do assessment work would not inure to the benefit of the Government, this interpretation was abandoned by the Department after the Supreme Court handed down *Hickel v. Oil Shale Corp.* in 1970, the Court concluding that "[*Krushnic* and *Virginia-Colorado Development*] must be confined to situations where there had been substantial compliance with the assessment work requirements of the 1872 Act." *Id.*, *quoting Hickel v. Oil Shale Corp., supra* at 57. We noted in *Cliffs Synfuel, supra* at 360 and in *Herr, supra* at 367, 101 I.D. at 122, that after the 1970 United States Supreme Court decision in *Hickel v. Oil Shale Corp., supra*,[2] the resumption doctrine was no longer applicable to oil shale claims, and we find that it is not available to Contestees here.

Finally, in *Herr, supra* at 367-68, we stated: "Having concluded that the Judge properly found the claims void for failure to perform assessment work, we need not, and will not consider whether the claims are invalid for other

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[2] *See* 30 *Rocky Mt. Min. L. Inst.*, § 10.02 [2] (1984), for a discussion of pre-*Oil Shale Corp.* decisions and regulations.

reasons." This principle applies to the present case. Thus, to the extent not discussed herein, BLM's arguments concerning the failure of Exxon's and Tosco's claims to meet the Department's test for a qualifying discovery are rejected as unnecessary to the determination that the claims are void. *See also, Cliffs Synfuel, supra* at 361. Therefore, that portion of the ALJ's decision below which addressed the question of a discovery of a valuable mineral deposit on each of the subject claims is set aside and the decision modified accordingly.

Except to the extent they have been expressly or impliedly addressed in this decision, all other errors of fact or law raised by Contestees or Contestant are rejected on the ground that they are contrary to the facts or law or are immaterial.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed in part, and set aside in part.

/s/ James P. Terry
James P. Terry
Administrative Judge

I concur:

/s/ David L. Hughes
David L. Hughes
Administrative Judge

UNITED STATES CODE ANNOTATED
TITLE 30. MINERAL LANDS AND MINING
CHAPTER 2 – MINERAL LANDS AND REGULATIONS IN GENERAL

§ 28. Mining district regulations by miners: location, recordation, and amount of work; marking of location on ground; records; annual labor or improvements on claims pending issue of patent; co-owner's succession in interest upon delinquency in contributing proportion of expenditures; tunnel as lode expenditure

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, that is granted a waiver under section 28f of this title, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred

shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

UNITED STATES CODE ANNOTATED
TITLE 30. MINERAL LANDS AND MINING
CHAPTER 3A – LEASES AND PROSPECTING PERMITS
SUBCHAPTER I – GENERAL PROVISIONS

§ 193. Disposition of deposits of coal, and so forth

The deposits of coal, phosphate, sodium, potassium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits in Lander, Wyoming, coal entries numbered 18 to 49, inclusive, shall be subject to disposition only in the form and manner provided in this chapter, except as provided in sections 1716 and 1719 of Title 43, and except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

UNITED STATES DEPARTMENT OF THE
INTERIOR BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

EMS Transmission
12/16/88
Memorandum

To: State Directors – Colorado and Utah

From: Director

Subject: Processing of Oil Shale Patent Applications

Purpose

The purpose of this memorandum is to provide guidance for the disposition of mineral patent applications for oil shale placer mining claims. The timing of this guidance is prompted by the attached letter to Senator Melcher from Principal Deputy Assistant Secretary Cason. This letter also contains the standards by which the Bureau is to adjudge the existence of a valuable oil shale deposit, and whether there has been substantial compliance with assessment work requirements, including the application of the resumption principle of the mining law (30 U.S.C. §28).

Timing and Procedures

Work on the further processing of the pending patent applications is to commence as soon as possible. Applications should generally be processed in the order that they have been received, with the exception that where a mineral report on a claim group can be prepared without resort to additional field work the processing of that application should be a priority.

Because of the continuing Congressional interest in these oil shale claims, please notify the Director (100) prior to the issuance of any patents. It will not be necessary to routinely supply documentation to the Headquarters Office of the proposed action. The decision to patent or contest mining claims remains delegated to State Directors.

To be able to respond to inquiries better in the Washington Office, please provide by December 23, 1988, your best estimate as to when the necessary mineral reports can be finalized for those patent applications for which the first part of the Final Certificate has already been issued, or for which some field work to verify discoveries and assessment work compliance has already been performed. We will rely upon the semi-annual patent application report to track the progress of the newer applications still undergoing adjudication.

Validity Standards

The standards to be applied in the preparation of mineral reports on these oil shale claims are as stated in the attached letter. While we are not required to have promulgated these standards as rules (because the conflicting IRLA precedents were mooted in the negotiated settlement of the *TOSCO v. Hodel* litigation) you should be aware that an effort to publish draft regulations is indeed underway. The preamble to the proposed rules describes in detail the rationale for these standards.

Attachment
Letter of 12/07/88 to Chairman Melcher

signed by: A.A. Sokoloski
Deputy Assistant Director – Energy
and Mineral Resources (Solids)

Honorable John Melcher
Chairman, Subcommittee on Mineral Resources
Development and Production
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is to inform you that the Department of the Interior intends to begin the further processing of oil shale mining claims patent applications pending in the Colorado and Utah State Offices of the Bureau of Land Management (BLM). We have decided to end our self-imposed delay on further processing these patent applications, including verification of whether the claims in question meet the test of discovery of a valuable mineral deposit within the meaning of the mining laws, and whether such claimants have substantially complied with the assessment work requirements.

We had hoped to reach a consensus with Congress on these issues prior to deciding to go forward with the task of making these determinations. Now that the 100th Congress has adjourned without enacting oil shale legislation, the Department feels compelled to carry out its duties under the Mining Law of 1872 to adjudicate the validity of mining claims for which a mineral patent is sought. As you know, two of the applications in Colorado have been pending since 1982. Our policy will be to expeditiously process mineral patent applications and either

issue patent to the successful claimant or contest the claims the BLM alleges to be invalid.

Our standards for the determination of validity of these oil shale claims shall be consistent with the statutes as interpreted by the U.S. Supreme Court. The standard of discovery of a valuable oil shale deposit shall be:

> An exposure of the prospectively valuable rich beds of oil shale of the Green River Formation within the boundaries of the mining claim yielding 15 gallons or more of shale oil per ton of rock, in beds not less than one foot thick, yielding 1500 barrels or more per acre. Further, this standard may be met by an exposure of a marlstone tongue of the Green River Formation, yielding not less than three gallons of shale oil per ton of rock upon destructive distillation, inferred to connect to the uppermost strata of prospectively valuable rich beds of oil shale lying at depth within the boundaries of the mining claim, but the inferred connection of the qualifying marlstone tongue need not occur within the confines of the mining claim.

This standard was formulated in *Freeman v. Summers* (1927), and subsequently held to be the correct interpretation on discovery by the U.S. Supreme Court in *Andrus v. Shell Oil Co.* (1980).

The standard for measuring substantial compliance with assessment work requirements of the mining law shall be:

> A mining claimant shall annually perform not less than $100 worth of labor or make improvements valued at not less than $100 per claim in an effort to develop a valuable mine. A lapse of qualifying assessment work performance of two

> or more years duration is sufficient basis upon which the United States may contest the validity of the mining claim, except that resumption of assessment work prior to the initiation of a challenge is an absolute defense in a contest brought on that basis.

This criterion is the result of several cases interpreting the Federal Government's role in policing assessment work performance. In *Hickel v. TOSCO* (1970), the Court held that the United States could contest mining claims for which only insubstantial or "token" assessment work was alleged to have been performed, but let stand earlier rulings which greatly limit the basis upon which such challenge could be made. *Wilbur v. Krushnic* (1930) holds that the resumption principle of the mining law (30 USC §28) bars challenge of mining claims by the Government as well as by rival claimants after assessment work is resumed. *Virginia-Colorado Development Corp. v. Ickes* (1935) holds that a lapse of one year in duration is not sufficient to support a contest by the Government.

As always, we remain available to discuss our views on these issues. Should Congress continue to feel compelled to propose legislation to address oil shale claims, we would be pleased to participate in the process to ensure that reasonable, equitable legislation is forthcoming.

Sincerely,

signed by: James E. Cason
Principal Deputy Assistant Secretary –
Land and Minerals Management

dated: December 7, 1988